

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 4, 1998

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 96A00019
SUNSHINE BUILDING)
MAINTENANCE, INC.,)
Respondent.)
_____)

FINAL DECISION AND ORDER

Appearances: Leila Cronfel and Dani Lisa Page for Complainant
Eric Ruderman for Respondent

I. Procedural History

This case arises under the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, which, *inter alia*, forbids an employer to hire an alien while knowing that the alien is not authorized to work in the United States, 8 U.S.C. §1324a(a)(1)(A), or to hire any individual at all without complying with certain employment eligibility verification requirements outlined in the statute, 8 U.S.C. §1324a(a)(1)(B). A violation of the first of these prohibitions is commonly referred to as a “knowing hire,” and of the second as a “paperwork violation.” On February 20, 1996, INS filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) which alleged that Sunshine Building Maintenance, Inc. (Sunshine or respondent) engaged in numerous violations of both these provisions. Sunshine filed a timely answer, and discovery and motion practice followed. On March 10, 1997 INS filed its second amended complaint in six counts seeking fines in the total amount

of \$61,480. A timely answer was filed denying the material allegations and raising certain affirmative defenses. The parties subsequently completed their discovery and prehearing procedures and on August 27, 1997 I issued a partial summary decision as to the allegations in Counts I, II, III, V, and some of the allegations in Count IV, and found that Sunshine had engaged in 19 separate paperwork violations.

As to the remaining issues, a hearing was held in this matter in Denver, Colorado from October 6, 1997 through October 10, 1997. A flurry of last minute motions occurred at or immediately preceding the hearing. INS filed motions to dismiss the allegations in Count IV relating to Juan Picazo Herrera also known as Cesar Hernandez and all the allegations relating to Omar Rodriguez Velasquez also known as Rafael Hernandez Solis. The motions were granted (Tr.34,15).¹ Sunshine filed a motion to exclude the testimony of Miguel Velasquez Rodriguez and Omar Rodriguez Velasquez on the grounds that their addresses and summaries of their testimony had not been furnished to Sunshine and that my order of September 22, 1997 to INS to make them available for deposition upon request was not complied with. The motion was moot as to Omar Rodriguez Velasquez, but was granted as to Miguel Velasquez Rodriguez (Tr.346). On September 29, 1997, Sunshine moved for sanctions for INS' actions relating to Agueda Bernal Alvarado,² which motion was denied (Tr.22–23). On October 2, 1997, Sunshine sought leave to amend its answer to include a new affirmative defense and to incorporate new facts allegedly obtained in discovery. INS filed a motion to strike the proposed new affirmative defense, and Sunshine filed a supplemental response to INS' earlier motion to strike its other affirmative defenses. Various motions by Sunshine were directed to the identification of INS' confidential informant.

Witnesses were sworn, evidence was heard, 198 exhibits were entered (JX1–2, CX1–43, 45–79, RXA–E, F1–F83, G–Z and AA–KK), and a transcript was prepared consisting of 843 pages. Testifying in the complainant's case in chief were Sunshine's President, Steven D. Franklin (Tr. 40–82), INS Special Agents Shawn McCoy (Tr.86–97),

¹The following abbreviations will be used throughout this decision:

Tr.— Transcript of hearing testimony	JX—Joint Exhibit
CX—Complainant's Exhibit	RX—Respondent's Exhibit

²The transcript erroneously refers to this motion as having been made with respect to actions relating to Natalia Montiel de Alvarado (Tr.22); the written motion makes clear that it was in fact addressed to Agueda Bernal Alvarado.

Kris Schaufelberger (Tr.98–107), and Michael Wheeler (Tr.110–214, 516–23), and former Sunshine employees Alfredo Alvarado Montiel (Tr.221–300), Eumelia Ramirez Madrigal (Tr.301–29), Natalia Montiel de Alvarado (Tr.229–345), Alfredo Ramirez Madrigal (Tr.350–79), Doris Aguirre de Erazo (Tr.380–92), Tomas Hernandez Picazo (Tr.409–26), Victor Hernandez Picazo (Tr.427–52), Isabel Arenas Salazar (Tr.453–68), Rosalia Jimenez Diaz (Tr.468–78), Carlos Jesus Bernal Alvarado (Tr.478–505), Maria Esperanza Ramirez Madrigal (Tr.506–15), and Cesar Hernandez (Tr.528–71). The witnesses testifying for the respondent Sunshine were Area Manager Steve Yandric (Tr.576–601), Personnel Manager Cindy Erazo (Tr.602–32), Office Manager Doris Fontaine Casey (Tr.633–59), former Office Manager Danielle Brann (Tr.659–97), and President Steven D. Franklin (Tr.697–814). Post hearing submissions were filed by the INS on January 14, 1998 and, after two extensions of time, by Sunshine on March 11, 1998, and the record was closed.

II. *The Issues Remaining for Decision*

A. *The Prehearing Order*

The parties had previously entered two sets of factual stipulations, one on August 21, 1997 and one on September 29, 1997 (JX1,JX2). Based in part upon the first set of stipulations, a partial summary decision was entered finding that Sunshine had committed 19 separate paperwork violations. The parties agreed and the pre-hearing order reflected that the following issues remained for hearing: 1) whether Martina Herrera was an alien not authorized for employment in the United States at any time during her employment with the respondent (Count I); 2) whether Leobardo Duarte, Maria Garcia Munoz, and/or Victor Hernandez were aliens not authorized for employment in the United States at any time during their employment with respondent (Count III); 3) whether respondent failed to make Form I-9 available for inspection by officers of the Immigration and Naturalization Service for Juan Picazo Herrera also known as Cesar Hernandez pursuant to subpoenas served on April 3 and July 24, 1995, and whether Juan Picazo Herrera also known as Cesar Hernandez and/or Pilar Flores were aliens not authorized for employment in the United States at any time during their employment with respondent (Count IV); 4) whether the respondent hired Mario Garcia Chavez and/or Miguel Velasquez Rodriguez for employment in the United States and, if so,

whether respondent hired them after November 6, 1986, and, if so, whether respondent had knowledge at the time it hired them that they were aliens not authorized for employment in the United States or continued to employ them knowing they were or had become unauthorized (Count VI); 5) whether respondent had knowledge at the time it hired the following individuals that they were aliens not authorized for employment or continued to employ them knowing that they were or had become unauthorized: Daroly Arenas Silva also known as Daroly Arenas, Lucia Estella Velasquez, Guadalupe Rodriguez Diaz, Pedro Antonio Herrera Olaque also known as Pedro O. Herrera, Claudia Mendez Beltran also known as Claudia Mendez, Rafael Perez Gonzalez, Alfredo Ramirez Madrigal, Maria Esperanza Ramirez Madrigal also known as Esperanza Ramirez, Angeles Solis Cortez, Arturo Villegas Castaneda also known as Arturo Villegas, Juan Picazo Herrera also known as Cesar Hernandez, Victor Hernandez Picazo,³ Carlos Arenas Avila, Hugo Arturo Villegas Corral, Omar Rodriguez Velasquez, Tomas Hernandez Picazo, Isabel Arenas Salazar, Octavio Murillo Hernandez, Rosalia Jimenez Diaz, Doris de Erazo, Eumelia Ramirez Madrigal, Natalia Montiel de Alvarado, Ernesto Garcia Carbajal, and/or Carlos Jesus Bernal Alvarado (Count VI); and 6) what civil money penalties are appropriate for each violation established.

B. The Motion for Leave to Amend

Four days prior to the hearing Sunshine filed a motion for leave to amend, together with an amended answer which INS' post-hearing submission contends attempts to retract its prior pleadings and stipulations as to a number of individuals as well as to raise a new affirmative defense of entrapment and/or prosecutorial misconduct.

I do not understand Sunshine's attempted amendment to have either the intent or the effect which INS alleges. Far from requesting to withdraw the prior factual stipulations. Sunshine's post-hearing brief expressly urges that the prior stipulations be accepted.⁴ Rather, it appears that many of the pleading paragraphs INS complains of are no more than repetition, perhaps inadvertent, of para-

³Despite the similarity of their names Victor Hernandez named in Count III is not the same person as Victor Hernandez Picazo named in Count VI. Hernandez' birth date is February 11, 1973 (RXGG, p.6), while Picazo's is November 8, 1955 (RX2).

⁴The first set of stipulations was already adopted and furnished the basis for the partial summary decision.

graphs which had been in Sunshine's original answer to INS' second amended complaint but were subsequently superseded by the stipulations and prehearing order. Apart from the newly proposed defense to the allegations of knowingly hiring illegal aliens (discussed elsewhere, *infra*), the other paragraphs complained of, with one exception, appear to simply elaborate upon previous denials or to assert additional exculpatory facts not material to the outcome of the case.

The motion itself is not particularly helpful in ascertaining either its purpose or its meaning other than as to the new proposed affirmative defense because it simply asserts that Sunshine seeks to update its answer as to "certain facts" obtained in discovery without ever specifying what those facts were. As nearly as I can tell, the only significant factual change proposed appears to pertain to Tina Garcia, named in Count IV, as to whom it was previously stipulated that she was hired after November 6, 1986 and that Sunshine failed to produce her I-9 form on July 28, 1995 for inspection pursuant to a subpoena by INS. Sunshine does not seek to contradict those stipulated facts, but rather seeks to add a new fact. The amendment would add the paragraph: "In regards to Tina Garcia the Respondent has recently discovered that although she was employed by it both before and after the July 24, 1995 subpoena and the July 28, 1995 inspection she was not employed by it at that time. (sic) Therefore Respondent was not required to produce her I-9 on July 28, 1995."

What Sunshine evidently seeks to alter here is not its prior stipulations but my prior legal conclusion in the order granting partial summary decision that Sunshine's failure to produce an I-9 for Tina Garcia constituted a paperwork violation. It was stipulated only that Sunshine hired Tina Garcia after November 6, 1986 and failed to produce her I-9 for inspection. INS' subpoenas (CX14,21) had both called for production of I-9s for its *current* employees; if Tina Garcia was not, in fact, a current employee then Sunshine would have had no obligation to present her I-9 in response to either the July 28, 1995 or the earlier April 3, 1995 subpoena.

OCAHO procedural rules⁵ provide under appropriate circumstances for amendments to the pleadings when determination on the merits will be facilitated, or to conform to the evidence, 28 C.F.R. §68.9(e), but do not address the question of what effect the prehear-

⁵Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

ing order has on the pleadings. I follow the general guidance of the Federal Rules of Civil Procedure which serve as a guideline where OCAHO rules are silent. 28 C.F.R. §68.1. The federal rule provides that a pretrial order controls the subsequent course of action unless modified and shall be modified only to prevent manifest injustice. FED. R. CIV. P. 16(e). The view that the prehearing order supersedes the pleadings and controls the subsequent course of the litigation is followed in the federal courts, including the Circuit in which this case arose. *Tyler v. Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997), citing *Hullman v. Board of Trustees of Pratt Community College*, 950 F.2d 665, 668 (10th Cir. 1992). See also 6A Charles Alan Wright, et al., *Federal Practice and Procedure* §1522, n.6 (1990). I follow it as well, and treat the motion, despite its nomenclature, as one to amend the prehearing order.

Although the Tenth Circuit has held that denial of leave to amend is generally justified only for the reasons listed by the Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962)(undue delay, bad faith, or dilatory motive), it has also held that untimeliness alone may be sufficient to deny leave, even without a showing of prejudice to the opposing party. *First City Bank, N.A. v. Air Capital Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir. 1987). Nevertheless, had Sunshine actually presented any evidence at the hearing, as opposed to the mere allegation, to show that Tina Garcia was not a current employee at the time of the subpoena or inspection, I would have been prepared to change my legal conclusion notwithstanding my doubts that Sunshine obtained this information “in discovery.”⁶ No such evidence was presented, however. Tina Garcia’s name appears on Sunshine’s handwritten list of employees as of April 3, 1995 showing a hire date of November 28, 1994 (CX15, p.14). It also appears on Sunshine’s Unemployment Insurance Reports of Worker Wages for the first, second, and third quarters of 1995 (CX66, p.19; CX3, p.13; CX68, p.11) and wages were paid to her in each of those quarters. It appears from this evidence that she was an employee at the time of both subpoenas. There was no sufficient evidentiary basis presented for me to conclude that Tina Garcia was not an employee of Sunshine in July 1995, or that Sunshine was not obliged to present her I-9. The proposed amendment as to Tina Garcia will accordingly be denied. As to any other proposed factual changes, leave

⁶Sunshine’s posthearing brief asserts that it discovered this information a few days prior to the hearing.

to amend will also be denied because the proposed amendments would be futile.

The issues remaining for decision in this matter are therefore those set out in the prehearing order, except for the allegations in Count IV as to Cesar Hernandez and the allegations in Count VI as to Omar Rodriguez Velasquez which INS dismissed prior to the hearing. The proposed affirmative defense of entrapment was taken under advisement pending the submission of the evidence.

III. *The Nature of Sunshine's Business*

Sunshine Building Maintenance, Inc. is a Colorado corporation which was incorporated in 1981 (Tr.41) and has its principal place of business at 7717 West 6th Avenue, Unit C, Lakewood, Colorado 80215 (Tr.42). It is engaged in the business of providing contract commercial janitorial services (Tr.43) to establishments in and around the greater Denver area. The company is wholly owned by its president Steven D. Franklin, who started it in 1979 with three employees and a contract for one building (Tr.698). It was built up gradually over the years (Tr.703), and now has a workforce of 300–350, depending upon turnover, and about 70–75 current contracts involving approximately 90 different locations (Tr.43). Its clients include restaurants, schools, medical and professional offices, government buildings, a church, a bank, and other commercial establishments at various locations in and around Denver, including Commerce City, Aurora, Broomfield, Boulder, Golden, Lakewood, Littleton, and Parker (CX16).

Management positions at Sunshine include an office manager, a personnel manager, a consultant who works with bidding, and a number of contract or area managers (Tr.44–47). Currently the office manager is Doris Fontaine Casey, who was hired in May of 1997 (Tr.633), and the personnel manager is Cindy Erazo, who was hired July 14, 1997 (Tr.602). At the time of the events at issue in this case, the office manager/personnel manager (Tr.80) was Danielle Brann. Her tenure was from June 1991 to mid–1995, when she left for maternity leave, then again from March 1996 to June 1997 (Tr.660,775).⁷

⁷In the interim there was evidently another office manager, Kelly J. Vera (RXGG, p.1), but her actions, except as to one paperwork violation, are not at issue in this case.

Contract or area managers work at the job sites (Tr.581). The duties of an area manager and a contract manager are basically the same; the difference is that a contract manager's location may be one particular site while an area manager might have a number of different locations (Tr.587). A manager might be in charge of anywhere from 1 to 20 different locations depending upon the size of the particular facility (Tr.46). There might be anywhere from 1 to 30 employees at a particular location (Tr.45). A given facility on a daily basis might be supervised by a working supervisor at a small facility, or a non-working supervisor at a larger facility (Tr.45). The supervisors work under the direction of an area manager or a contract manager (Tr.47–48,580).

The person in charge of the facilities at issue in this proceeding was Henry Moret, contract manager for a contract involving four Cherry Creek High Schools: Cherry Creek High School, Smoky Hill High School, Eaglecrest High School, and Overland High School (Tr.704,713). Supervisors and assistant supervisors at the four schools worked under his direction. His tenure in that capacity was from June 1994 (Tr.713) to October 1995 (Tr.751) and his successor was evidently Estela Gamma (Tr.310), a former supervisor at Overland High School (Tr.546) (CX22, p.26).

IV. *The Duties Imposed on Employers by INA*

The government estimates that there were 5 million illegal immigrants in the United States in October 1996 and that the number was increasing at the rate of approximately 275,000 a year. *U.S. Hires 1000 Border Patrol Agents; Most Going to Texas, Director of INS Says*, Washington Post, March 11, 1998, at A17. For more than a decade, the Congress has been trying to slow the influx of unauthorized aliens into the United States.

By enacting the Immigration Reform and Control Act of 1986 (IRCA) as an amendment to the INA, the Congress made significant revisions in national policy dealing with illegal immigration. IRCA for the first time made it illegal for an employer to knowingly hire an undocumented alien to work in the United States, 8 U.S.C. §1324a, or to hire anyone to work in this country without verifying the person's identity and work authorization status. 8 U.S.C. §1324a(b). A prospective employer has been obligated by law since 1986 to examine specific documents demonstrating each prospective worker's identity and work eligibility, to observe verification and

record keeping requirements by completing a form designated by the INS for use in complying with the law, and to attest under the penalty for perjury that he or she examined legally acceptable documents which establish that the employee is eligible for work. Applicable regulations prescribe Form I-9 for the purpose of making and preserving the necessary records. 8 C.F.R. §274a.2(a). The underlying goal of the verification system is to ensure that any new employees after November 6, 1986 are not unauthorized aliens. OCAHO case law has reviewed the legislative history of the verification system on a number of occasions. *See, e.g., United States v. McDougal*, 4 OCAHO 687, at 863-64 n.2 (1994),⁸ wherein it was also observed that the U.S. Commission on Immigration Reform had recently stated:

Employment continues to be the principal magnet attracting illegal aliens to this country. As long as U.S. businesses benefit from the hiring of unauthorized workers, control of illegal immigration will be impossible (citing the Statement of Barbara Jordan, Chair of U.S. Commission on Immigration Reform Before the Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, U.S. Senate (Aug. 3, 1994)).

The Congressional purpose of IRCA's provisions was clearly to deter the illegal immigration of persons in search of jobs by requiring employers to verify the employment eligibility of their employees within three days of hiring them, and to hire only lawfully authorized employees.

Employers in this country thus have an affirmative duty to prepare and retain certain records for every employee hired after November 6, 1986, and to make those records available for inspection by INS officers. Each failure to properly prepare, retain, or produce I-9 forms in accordance with the employment verification system is a separate violation of the Act. Requirements include, *inter alia*, the timely attestation of the employer or agent under penalty of perjury that specific documents have been examined to verify that the individual is not an unauthorized alien, 8 U.S.C. §1324a(b)(1).

⁸Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

The employer also has a duty to ensure that the employee attests under penalty of perjury that he or she is eligible for employment on the day of hire, 8 U.S.C. §1324a(b)(2). More detailed guidance on compliance with the statute is found in the accompanying regulations, 8 C.F.R. §274a.2(b)(1)(i)(A) and 8 C.F.R. §274a.2(b)(3), and in the Handbook for Employers which gives instructions for completing Form I-9. The form itself contains a list of acceptable documents and instructions for its completion on the reverse side.

V. Summary of Complainant's Evidence

INS presented testimonial and documentary evidence through its agents about the events leading to this action, and through Sunshine's former employees about the company's hiring practices.

A. INS' Investigation of Sunshine

INS Special Agent Wheeler testified that in March of 1995, he was contacted by a confidential informant who told him that Sunshine was hiring people it knew to be illegal aliens (Tr.112). Wheeler served a subpoena on Sunshine on April 3, 1995 seeking production of all its I-9 forms for its then-current employees (Tr.114) (CX14). Danielle Brann, the office manager, accepted the subpoena on behalf of Sunshine and subsequently delivered a handwritten list of employees (CX15) and the other requested documents to Agent Wheeler (Tr.114-15). Agent Wheeler then conducted an audit of the I-9 forms. If an individual's I-9 listed an immigration document number, he ran that number on INS' Central Index System (CIS) (Tr.117). Wheeler said he checked 74 individuals on the Central Index System, but was unable at that time to check individuals for whom the only documents listed were state identification documents and social security cards (Tr.117). There were 163 Sunshine employees whose names he was unable to check (Tr.117,173). All 74 of the employees whose immigration document numbers Wheeler did check on the index system were found to be unauthorized aliens (Tr.118,125-26). The five establishments under contract with Sunshine which had the largest numbers of illegal workers were the UPS facility in Commerce City and the four Cherry Creek High Schools (Tr.128). Wheeler reported his findings to his supervisor who requested him to check for any other complaints about Sunshine (Tr.128). The search revealed that there had been two other recent complaints about illegal aliens being hired at Sunshine (Tr.129). The first of these was received on or about March 31, 1995 when a

woman came into the INS office and complained about three specific named Sunshine employees whom she alleged to be illegal aliens (Tr.89). She was interviewed by Special Agent Shawn McCoy at the direction of Supervisory Special Agent Himelrick, and a memorandum was made of her complaint (Tr.89,93). Shortly thereafter on April 11, 1995 a telephone complaint was made that Sunshine was hiring people illegally (Tr.101). Duty Officer Special Agent Kris Schaufelberger took the call which came from a Spanish speaking person who provided the names of two people alleged to have been hired illegally by Sunshine (Tr.102). Agent Schaufelberger was not certain but believed the caller to be a woman (Tr.104). After reviewing these complaints, Wheeler recommended to his supervisor that a sanctions case be opened against Sunshine (Tr.129). In the course of his investigation, he subsequently spoke with the confidential informant about Sunshine again on two occasions, first in April 1995, and then in June 1995 (Tr.130). In April the informant told him that Henry Moret had instructed the supervisors at the high schools to alter the work schedule so as to hide the illegal aliens (Tr.247-48) (CX18), and that Henry Moret was to be paged if the INS came to any of the schools (Tr.253) (CX18). In June the informant told Wheeler that Sunshine had also obtained a new contract for 17 schools in Aurora, that many of the illegal employees had been transferred to those schools, and that the people filling their vacant slots at the high schools were also illegal. (Tr.133-34) (CX19).

On July 20, 1995 INS conducted an employer sanctions operation (worksite enforcement operation) involving three of the four high schools: Cherry Creek, Smoky Hill, and Eaglecrest (Tr.135). Thirty five people were arrested (Tr.137), 12 at Smoky Hill High School, 12 at Cherry Creek High School, and 11 at Eaglecrest High School. Three were later released. Agent Wheeler went to Smoky Hill High School that same day where he met with and spoke to Henry Moret, the contract manager for the high schools (Tr.139) (CX20). Moret told Wheeler that he personally took documents from the employees to prepare the I-9s when he hired them, but that he couldn't tell good documents from bad ones (Tr.139-40,172). The confidential informant had told Wheeler that in fact the practice was for the school supervisors to make copies of the documents and give only copies, not originals, to Henry (Tr.140). Of the 32 unauthorized employees arrested, 28 were placed on an immigration bus and returned to Mexico (Tr.138). Four requested hearings.

Wheeler also testified as to details of INS records relating to a number of specific Sunshine employees.

B. Testimony of Sunshine's Former Employees

Some of Sunshine's former employees testified about the circumstances of their hiring at the schools and how their paperwork was handled. Others gave statements to INS after being arrested on July 20, 1995 (CX35-41,47).

Cesar Hernandez

Cesar Hernandez Arenas, also known as Cesar Hernandez and as Juan Picazo Herrera (Tr.528), an illegal alien then sixteen years of age (Tr.530), testified that he heard an announcement on a Spanish radio station in June of 1994 that Sunshine was looking for workers. He and his mother, Isabel Arenas Salazar, also an illegal alien (Tr.544) went together to Sunshine's office where they both filled out Sunshine's employment application and spoke to Danielle Brann, the office manager (Tr.455-56). Hernandez filled out the top of an I-9 form using the social security number of the minor son of a woman he was then living with, Guadalupe Saenz (Tr.531). He testified that he had photocopied the child's card, then put his own name on a blank piece of paper and laid it over the top of the child's name (Tr.532). He said that he gave a copy of this photocopied card, together with his ID, to Danielle Brann (Tr.532). Hernandez and his mother started work that same day, June 30, 1994 (Tr.553). Cesar Hernandez said he never showed any documents to Henry Moret, only to Danielle Brann (Tr.535-36). Later Hernandez learned that Guadalupe Saenz had called Sunshine and reported him for using her son's social security number (Tr.534). She threatened to call Immigration if Hernandez was not fired (Tr.535). He was told that he could work if he got other papers with his own name on them, so he bought a card from California for \$50 (Tr.536). In December of 1994 he went to the office again to fill out another application, and when he showed Danielle Brann his new card she jokingly asked him who it belonged to (Tr.537). After that, he heard that Sunshine needed someone to work at Cherry Creek (Tr.538), so he talked with Benito, the supervisor there (Tr.539). He was present when Benito talked on the telephone to Henry Moret (Tr.539-40), and the next day Hernandez was made assistant supervisor at Cherry Creek High School (Tr.540). He left that job because Soledad Peña, an illegal alien and the fiancée of Henry, threatened to accuse him of sex-

ual harassment (Tr.540–43). Alfredo Alvarado Montiel had hired Soledad Peña, and Henry had gone with her to help her get work documents. Henry told him they paid \$70. Hernandez said that in January he was notified through his mother to come back to work at Overland High School and he did (Tr.543). The supervisor there wanted him as her assistant supervisor (Tr.544). When she left, Henry Moret offered him the supervisor’s job but he declined (Tr.545–46). Later he transferred to Smoky Hill High School (Tr.546). All told, he worked three different times for Sunshine. Records for Hernandez also show two different I–9s, one dated June 30, 1994 signed by Henry Moret showing the social security number 523–41–9203 and stating that Hernandez was a United States citizen (CX49), and one signed by Danielle Brann dated December 20, 1994 with the social security number 606–02–1418 stating that Hernandez was a lawful permanent resident alien (CX50, p.5). Payroll records demonstrate that Cesar Hernandez used two different social security numbers during his employment at Sunshine. He was paid under the first of these social security numbers in July of 1994 and under the second in February, 1995 (CX51,52). There are two Employee Termination Departure Records for Hernandez. The first shows the last day worked as February 7, 1995 and states: “Quit No Notice Do Not Recommend for Rehire” and is signed by Henry Moret (CX50, p.2). It also contains the notation “rehire 2/28/95.” The second shows the last day worked as July 20, 1995, the day he was arrested by INS, and indicates that he was terminated for giving false documents to the company (CX50, p.1).

Isabel Arenas Salazar

Isabel Arenas (Salazar) said she went with her son to apply for work because he spoke a little English and she did not (Tr.455–56). Arenas also used a social security number which was not valid. She said it was an old one which she had bought (Tr.460). When Arenas applied, Danielle Brann made copies of her papers and told her to go to Smoky Hill High School at 3 o’clock that day. At Smoky Hill Arenas talked to “Wes” and “Alberto” (Tr.458–59). Wes was the supervisor and Alberto was his assistant (Tr.467). A month or so after Arenas and Hernandez started work, the employees were told to bring their documents to work to be reviewed (Tr.460). Arenas left her papers overnight and Alberto returned them to her (Tr.460–61). She never spoke with Henry Moret because he speaks only English (Tr.459), and she never showed any documents to Henry Moret (Tr.460). The I–9 form for Isabel Arenas is dated June 30, 1994, the

same day she started work, and is signed by Henry Moret, Manager (CX54). Moret attested under the penalty of perjury that he examined her Colorado ID and original social security card number 687-22-9012 that day.

Natalia Montiel de Alvarado

Natalia Montiel de Alvarado, an alien not authorized to work in the United States, said she was told by a neighbor named Luz in June of 1994 that Sunshine was recruiting workers (Tr.330-31). Luz took Montiel to Overland High School where she was given an application for employment and introduced to "Tom" and "Wes" (Tr.331-32). She showed them a Colorado ID (Tr.332). She recognized her signature on her I-9 form (CX60, p.3), but said nothing else on the form was in her writing (Tr.334). Montiel showed her papers to "Lili" and "Virginia" (Tr.332-33), but to no one else at Sunshine. Wes asked for papers but she was embarrassed because her social security number, 522-85-8744, wasn't good. She thought Lili and Virginia were going to make copies, but she never saw the copies. She thought they were put in a file (Tr.337-38). She never showed these documents to Danielle Brann (Tr.335). Her I-9 form is signed by Danielle Brann and dated July 13, 1994 (CX60). In that form, Brann attested under the penalty of perjury that she examined Montiel's Colorado ID and original social security card number 522-85-8744 that day. Montiel's original social security card number 522-85-8744 bears the words "Not Valid for Employment" (CX7). She was not arrested on July 20, 1995 when INS came because she was not at work (Tr.338). She had worked the morning shift that day (Tr.339-40). She continued to work at Sunshine until November 1995 (Tr.343).

Alfredo Alvarado Montiel

Alfredo Alvarado Montiel testified that he started working at Sunshine in October 1994 and worked there about a year (Tr.224). He speaks and reads English a little (Tr.224). His mother, Natalia Montiel, worked there first, and she told him that they needed more workers. She was illegal (Tr.225). He went to Overland High School with her and had an interview with the supervisor, Nathan Moret (Tr.225-26). He was hired that night as an assistant supervisor at Overland, then became a supervisor at Morganfield (Smoky Hill) (Tr.226-27,233). He had no experience as a supervisor and was given no training (Tr.230-31). Henry Moret is the person who made

him a supervisor (Tr.233). He was given authority to hire employees (Tr.234) and told to give them the employment package (Tr.235). His instructions for hiring were to put copies of the new employee's social security card or state ID in back of the application (Tr.237). He did as he was told. When he told Henry that some of the papers didn't look right, Henry told him that wasn't a problem, they just needed copies of the social security card and one ID (Tr.240, 276). When he hired Soledad Peña, an unauthorized worker, she didn't have any documents (Tr.243-44). He told Henry and Henry said she could get a loan from the company to get her documents. Henry went with her and helped her get papers (Tr.243-44). Henry said that for \$70 you can get documents (Tr.244). He knows Claudia Mendez as a good friend of Henry Moret. She was an illegal alien who was fired from Overland. He knew her first as Virginia, but later Henry hired her at Cherry Creek under the name Claudia Mendez (Tr.244-45).

Henry Moret came to Smoky Hill one day very angry looking for Cesar Hernandez and told him that Guadalupe Saenz⁹ had called Steve Franklin's office to report Cesar's use of her child's social security number (Tr.246). Moret suspended Hernandez until he could get a card with his own name and a different social security number (Tr.247). On one occasion, Henry wanted to change some of the Friday work until Saturday so the illegal ones wouldn't be there on payday in case immigration came (Tr.247-48). Alvarado said he told Henry that Carlos Bernal was illegal (Tr.287), and also told him that Tomas Hernandez Picazo was unauthorized to work (Tr.294).

Henry Moret was very upset with him after INS came on July 20, 1995 because he was supposed to dial three zeroes on his beeper to notify Moret if they came (Tr.253,279). INS did not allow Alvarado to use the telephone so he couldn't do it (Tr.254). After the INS employer sanctions operation, his instructions as to hiring changed in that he was told to get the documents right away (Tr.299). Before that they just had to be turned in time for the next pay period (Tr.237). He completed his own employment package several months after he was hired, so the date on the form is not the real date (Tr.250). He was called on the telephone for his social security number but not asked for the document (Tr.261). A long time after he started there, Henry gave him documents from the employees to review, and also asked him for his own documents (Tr.261). His I-9

⁹Guadalupe Saenz is referred to several times as Soledad Saenz; the misnomer was corrected to clarify that her name was actually Guadalupe Saenz (Tr.298).

form (CX78) is dated October 1, 1994 and is signed by Henry Moret who attested under the penalty of perjury that he examined Alvarado's Colorado Driver's License and original social security card number 523-83-7433 that day.

Eumelia Ramirez Madrigal

Eumelia Ramirez Madrigal also known as Melis Madrigal started working for Sunshine in March 1995, after her friend Cesar Hernandez told her that Sunshine needed workers and brought an application to her home (Tr.303). Cesar Hernandez filled her application out (Tr.318) and she went with him to Overland High School (Tr.304), where she started work that day. Cesar told her to make copies of her ID and social security card and to put them with her application (Tr.304). She made the copies herself, and never showed anyone at Sunshine the originals (Tr.314). The card was one she bought on the street in California (Tr.305). She spoke to Henry Moret on one occasion and told him that if she had a good document she wouldn't be working at Sunshine (Tr.306). She never showed Henry Moret the originals of her documents (Tr.307). She recognized her signature on the I-9 but only that (Tr.307) (CX58). She started at Sunshine the same day as her sister, Maria Esperanza Ramirez Madrigal (Tr.314), but before her brother, Alfredo Ramirez Madrigal (Tr.314). Her I-9 is dated March 14, 1995 and is signed by Henry Moret who attested under the penalty of perjury that he examined her California Driver's License and original social security card number 657-76-5746 that day (CX58).

Maria Esperanza Ramirez Madrigal

Maria Esperanza Ramirez Madrigal testified that she got her job at Sunshine through someone named Anthony whose last name she doesn't know (Tr.507). She believes Anthony worked at Cherry Creek (Tr.508). He told her to call Smoky Hill and ask for Alfredo (Tr.507). She went to an interview and was hired that day (Tr.508). Later she was given papers to fill out and they made a copy of her ID (Tr.508-09). She said she wrote down the social security number of her 3-year-old daughter Johanna Bojorquez, but did not show a social security card to anyone at Sunshine (Tr.511). She never showed Henry Moret her ID or social security card (Tr.513). Her I-9 form is signed by Henry Moret, who attested under the penalty of perjury that he examined her Colorado ID and social security card number 618-60-2051 (CX48). The date on her signature is March

28, 1995. The same date is crossed out in the attestation portion and the date March 15, 1995 is substituted (CX48). Maria Esperanza Ramirez Madrigal previously had given a statement to the INS on July 20, 1995 in which she stated that she walked across into the United States on July 5, 1990 (CX46) and was hired at Sunshine by Anthony Gonzalez in May of 1995. Her supervisor was Alfredo Alvarado. She said she has never had any INS-issued work documents. She also claimed she had shown an ID and social security card at Sunshine which were both genuine according to her statement. She thought Anthony had to know she was illegal though, because her English language skills were not good (CX47).

Doris Aguirre

Doris Aguirre de Erazo also known as Doris Erazo Aguirre and Doris Aguirre (Tr.380) started working for Sunshine in June of 1995 (Tr.381). She said she was told by her friend Soledad Ramirez that there might be work available at one of the schools (Tr.381–82). She spoke to Alfredo, but he said there was no work available. Later he told her to go to Smoky Hill High School (Tr.382). She doesn't read English and doesn't know what papers she filled out (Tr.383). She was at Smoky Hill High School one week, then they sent her to Eaglecrest High School (Tr.384). When she filled out her application both Alfredo Madrigal and Henry Moret were present (Tr.387). She asked Alfredo Madrigal to fill out the employment package. Henry Moret asked her for an ID and social security card. She showed him a California ID but did not have a social security card, only a number written on a piece of paper (Tr.387–88). She gave Moret the piece of paper with the number on it, but not a social security card (Tr.389). Henry wrote the number on the form (Tr.388). She was not authorized to work in the United States (Tr.385). The social security number she used is one sent to her by a friend in California so that she could work (Tr.387,390). Her I–9 form is dated July 17, 1995 and signed by Henry Moret who attested under the penalty of perjury that he examined her California ID and original social security card number 608–40–4708 (CX56, p.3) that day. Aguirre was arrested at Smoky Hill High School on July 20, 1995 (CX57).

Rosalia Jimenez

Rosalia Jimenez Diaz also known as Rosalia Jimenez (Tr.468) started work at Sunshine July 3, 1995 (Tr.469). She got the job through a friend, Melis Ramirez, who also worked at Smoky Hill (Tr.

469–70). She had a California ID but no social security card, so she left the box blank where you put the social security number (Tr.470). Alfredo gave her a number on a paper and told her to write it on the application (Tr.473). She does not know Henry Moret, and never showed him her ID and social security card on July 3, 1995 (Tr.474). Her I–9 form is signed by Henry Moret who attested under the penalty of perjury that he examined her California ID and original social security card number 528–55–74215 (sic) (CX55, p.3); the top of the form indicated that her social security number was 528–55–7421.

Alfredo Ramirez Madrigal

Alfredo Ramirez Madrigal was told by a friend that they were hiring at Smoky Hill (Tr.353). He said Alfredo Alvarado Montiel sent him to Cherry Creek, where he worked for Anthony (Tr.354). Henry Moret came to Cherry Creek and talked to him about becoming a supervisor at Eaglecrest High School (Tr.355–56). Henry introduced him to Nathan Moret, the supervisor at Eaglecrest who would train him for the job (Tr.357). Henry helped him fill out an application with many pages. Henry filled out the boxes (Tr.359). He doesn't know where Henry got the alien number he wrote down (Tr.358–60). His I–9 form is signed by Henry Moret who attested under the penalty of perjury that he examined a California ID and an original social security card number 555–30–7339 (CX42). The social security number was a false number he had been using (Tr.360). He showed a copy of it when he was hired (Tr.367). Henry's instructions to him were that when he was hiring employees, he should make copies of the person's documents and put the copies in the desk (Tr.362). Ramirez Madrigal hired Doris Erazo also known as Doris Aguirre, who was sent to Eaglecrest from Smoky Hill (Tr.363). Henry came over when she filled out her application and Ramirez Madrigal translated. Henry told him to make copies of her documents. She showed a Colorado ID and a piece of paper with a social security number on it (Tr.363–64), but she never brought in a social security card (Tr. 365). Ramirez Madrigal never had any training or experience as a supervisor; he just did what they told him to (Tr.365–66). He was arrested himself at Smoky Hill on July 20, 1995 (CX77).

Carlos Jesus Bernal

Carlos Jesus Bernal (Alvarado) started at Sunshine in October of 1995, well after the employer sanctions operation. His cousin intro-

duced him to Henry and told Henry that he had no papers (Tr.479–80). He started work the next day at Smoky Hill High School. He got a Colorado ID and filled out an application for a non-work social security number (Tr.481). They gave him a receipt saying he had applied (Tr.411–12), but it also said that when it issued his number wouldn't be valid for work. Alfredo Alvarado told Patricia to make a copy of the letter and try to omit the part saying it wasn't valid. Later Henry said he needed a social security number to get paid so he went to social security with Alfredo and got a number (Tr.483). When the I–9 was filled out, he didn't have a number (Tr.485). He never showed his social security card (CX63) to anyone at Sunshine and never presented any documents at all to Estela Gamma, whose signature appears on his I–9 Form (Tr.486) (CX62). Estela Gamma attested under the penalty of perjury on October 16, 1995 that she examined his Colorado ID and social security document number 523–97–7265 (CX62). The attachment showing a social security number appears to be dated October 18, 1995 (RXH, p.2). His original social security card displays the words “Not Valid for Employment” (CX63). He was arrested on August 19, 1996 (RXH).

Victor Hernandez Picazo

Victor Hernandez Picazo and his brother Tomas were both illegal aliens (Tr.416). His sister-in-law Isabel Arenas and his nephew Cesar Hernandez took him and Tomas to Smoky Hill High School and told Alfredo that they had just arrived from Mexico (Tr.430–31). They started work, then bought documents in downtown Denver which Cesar took to Alfredo (Tr.433). He said he worked for five days before being arrested (Tr.428–29). His son Miguel Angel (Miguel Velasquez Rodriguez) also worked illegally at Smoky Hill and was arrested (Tr.434–35). Papers had been purchased for Miguel Angel but were never delivered to Sunshine because they were not ready (Tr.436). He did not tell INS the truth about where he had purchased his documents because he didn't want to get his sister-in-law in trouble. He previously told INS he bought the documents in Agua Prieta, but this wasn't true (Tr.451). Victor Hernandez Picazo had previously given a statement to INS (RX2) in which he stated that he only worked two days at Sunshine.

Tomas Hernandez Picazo

Tomas Hernandez Picazo said he worked five days for Sunshine (Tr.410). Some of his coworkers took him downtown to buy a green

card and a social security card for which he paid about \$70 (Tr.413–14). He had previously given a statement to INS in which he said that he worked for two days and that he bought the documents at a hotel in Agua Prieta (RXAA). He did not recall making that statement (Tr.418), nor was he able to identify his photograph (Tr.417).

C. Other Evidence

Additional documentary evidence was also presented about Sunshine's former employees, some by the respondent. Daroly F. Arenas-Silva gave a statement to INS on July 20, 1995 about her employment at Sunshine, in which she said that she last entered the United States on November 3, 1994 from Tijuana by crossing the border with a smuggler (CX35). She started work at Sunshine on June 1, 1995. She was hired by Magdalena Gonzales, but after that her supervisor was Ruben Hernandez. She showed a false green card and a false social security card which she bought in May for a total cost of \$150. The picture on her green card had been cut out, so she thought Magdalena must have known it was not real. She also purchased a Colorado ID in December 1994 for \$100. The signature of the person at Sunshine who attested on the I–9 form to examining her documents is barely legible but appears to be that of Henry Moret (RXDD, p.2).

Lucia Estella Velasquez gave a statement to INS on July 20, 1995 in which she stated that she last entered the United States illegally at El Paso, Texas on April 20, 1994 (CX36). The person at Sunshine who hired her was Henry, last name unknown. She started on July 2, 1994. Her first supervisor was Juan, then Ruben. She said she was never asked to sign Form I–9 and did not do so. She presented a false green card and a social security card which she bought in San Diego for a total of \$100 in May of 1994. She never showed these or any documents to Henry (CX36). Henry Moret attested under penalty of perjury on an I–9 form that he examined her alien registration card number A 093891256 (RXEE, p.2). She was arrested at Cherry Creek High School on July 20, 1995 (RXEE, p.1).

Guadalupe Rodriguez Diaz gave a statement to INS on July 20, 1995 in which she stated that she entered the United States in May illegally through El Paso (CX37, p.3). She started work at Sunshine on June 12, 1995. Her supervisor, Freddy, was also arrested on July 20, 1995. The person she rode to work with, Ernesto Garcia, was also

illegal. She bought a social security card in May from a man at the flea market for \$30. She also had a Colorado ID. She was asked only to bring in copies of her ID and social security card, so she made copies at King Soopers and turned them in (CX37, p.7). She never saw form I-9. Her I-9 form is signed by Henry Moret and dated June 12, 1995 (RXQ, p.2). Henry Moret attested under the penalty of perjury that he examined her Colorado ID and original social security card number 532-57-2457. The top of the form indicated that her number was 532-67-2457.

Pedro Antonio Herrera Olaque gave a statement to the INS on July 20, 1995 in which he stated that he entered the United States illegally in the middle of May of 1995 at Tijuana (CX38). He never had any INS-issued work document. He was hired by Alfredo Ramirez and worked at Smoky Hill High School. He showed a false social security card and Form I-551 which he bought on the street in Los Angeles in May for \$60. They are easy to tell from the good ones. He was arrested July 20, 1995 at Smoky Hill High School (RXY, p.1). Henry Moret attested on July 25 (sic), 1995 under the penalty of perjury that he examined alien registration card number A 09733980 and an original social security card; the top of the form shows the alien number in fact is A 097339801. The attestation in the I-9 is dated five days after Pedro Antonio Herrera Olaque was arrested at Smoky Hill (RXY, p.2).

Claudia Mendez-Beltran gave a statement to the INS on July 20, 1995 in which she stated that she last entered the United States illegally on November 1, 1994 at El Paso, Texas (CX39). She was hired at Sunshine by Henry about June 20, 1994 and her supervisor was Ruben. She was asked for her social security card and she signed Form I-9 when she started in June 1994. She showed a false social security card and green card which she bought on the street in Los Angeles for \$50 for both. The statement further asserts that there were a lot of illegals at Sunshine and the employer talked with them about it. Her I-9 is signed by Henry Moret and dated January 23, 1995, attesting that he saw her alien registration card A 095871670 on that day (RXK, p.2). Alfredo Alvarado testified that she had previously worked at Overland High School under the name Virginia and been fired there but was rehired by Henry Moret at Cherry Creek under the name Claudia. The name Claudia Mendez appears for the first time in Sunshine's Unemployment Insurance Report of Worker Wages in the first quarter of 1995 (CX66, p.24). Sunshine's Unemployment Insurance Report of Worker Wages for the third and

fourth quarters of 1994 show wages were paid during those two quarters to Virginia Mendez (CX64, p.16, CX65, p.11), but ceased in the first quarter of 1995, when wages began to be paid for Claudia Mendez.

Rafael Perez-Gonzalez gave a statement to the INS on July 20, 1995 in which he stated that he last entered the United States illegally from El Salvador on January 25, 1995 (CX40). He “simply jumped the line” at El Paso. He never had any INS-issued work documents. He was hired at Sunshine by a man named Carlos who knew he was from El Salvador, and he started about April 16. He never showed Carlos any documents, but told Carlos he was applying for documents later. Carlos quit in May, so Perez-Gonzalez talked to an assistant or supervisor named Juan. He did not fill out any forms when he applied because he did not read English. The only form he remembers signing was the application which a friend filled out for him. In May, he purchased a counterfeit green card and social security card for \$60 total from a man he met in a restaurant. He showed these documents to Juan. He worked at Cherry Creek High School. His I-9 form is signed by Henry Moret on March 10, 1995 attesting that Moret examined his alien registration card A 092642715 on that date (RXU, p.2).

Arturo Villegas Castaneda gave a statement to the INS on July 20, 1995 in which he stated that he crossed on foot illegally into the United States at El Paso, Texas on May 31, 1995 (CX41). He never had any INS-issued work documents. He started working for Sunshine in June 1995 at Cherry Creek High School. He was hired by Anthony but his supervisor was Ruben. He never showed any documents to Anthony or Ruben. He told Ruben he had just arrived from Mexico. He signed an I-9 but never showed any documents (CX41). He was arrested at Cherry Creek High School on July 20, 1995. His I-9 form was signed by Henry Moret on June 5, 1995 and attests under penalty of perjury that Moret examined his alien registration card number A 091256213 (RXL, p.2).

Octavio Murillo Hernandez entered the United States on foot without inspection in 1994 and was arrested July 20, 1995. He used a Colorado driver's license and a false social security card to obtain employment. His I-9 is signed by Henry Moret, who attested under the penalty of perjury that he examined Murillo's driver's license and original social security card (CX4, RXT, p.2).

Ernesto Garcia Carbajal was arrested with his wife at Eaglecrest High School on July 20, 1995 (RXM, p.1). He said he was hired by a man named Nathan, and that he showed a Colorado ID and a false social security card. His supervisor after that was Freddy Ramirez. His I-9 form is signed by Henry Moret, who attested under the penalty of perjury that he examined the employee's Colorado ID and original social security card number 534-65-9345 (RXM, p.2).

Angeles Solis Cortez gave a sworn statement (RXP, p.2-11) in which she stated that she had been in the United States for two weeks and had been employed for one week. She did not know the name of the company or of her supervisor. She was never asked to sign an I-9 form. She showed a counterfeit green card and social security card she bought for \$100 on Monday. She was arrested July 20, 1995 (RXP, p.1).

Other documentary evidence included a sample of Sunshine's Employment packet, which consisted of an employment application, a W-4 form, a designation of worker's compensation provider, an I-9 form and a copy of Sunshine's Rules and Regulations (Tr.49-50) (CX1).

VI. *Summary of Sunshine's Evidence*

A. *Testimony of Sunshine's Managers*

Sunshine's current and former management personnel testified and presented documents about the company's hiring practices and the procedures for complying with the employment eligibility verification system during the period at issue, and about how the practices and procedures have changed since that time.

Steve Yandric

Steve Yandric testified that he had worked for Sunshine for seven years (Tr.576) and that he was currently the area manager for the west and the downtown area (Tr.578-79). He started as a contract manager (Tr.580,587), and was trained by Steve Franklin as to how to complete I-9 forms (Tr.587-88). Yandric knew that documents he examined for the purpose of determining an individual's employment eligibility had to be originals, not copies (Tr.592). Up until 1995, supervisors as well as managers had the authority to hire and to sign off on the attestation section in the I-9 form (Tr.589-91). If

the supervisor was the one who received the documents, he was also the one who signed the attestation (Tr.591). After July or August 1995, there was more training and only the contract manager could sign the I-9 form (Tr.577-84). The usual practice had been to turn the I-9 form in with the payroll information (Tr.584-86). After the additional training the rule was that the forms had to be turned in within 72 hours (Tr.584-86), and there eventually came a time when supervisors were no longer allowed to do any hiring (Tr.597-98). That change was made about three or four months ago (Tr.597). Yandric himself sends everyone to the main office now unless he knows the individual personally (Tr.600).

Danielle Brann

Danielle Brann, Sunshine's former office manager, testified that in 1991 when she started at Sunshine she was trained as to the procedure for completion of I-9 forms by Franklin and by Jerry Katz, the vice president for sales (Tr.661). Her training took less than an hour (Tr.661). She also reviewed a pamphlet in the office (Tr.662). She knew that you had to look at original documents (Tr.663) and that was the company policy as well, that they had to have the original documents (Tr.669). From the time she started in 1991 until 1994, she was the only person in the main office doing hiring (Tr.686). She did not speak Spanish, so if an applicant didn't speak English they would look for a manager who spoke Spanish (Tr.681-82). When she came back in 1996, there was a Spanish-speaking personnel manager in the office (Tr.682,688). Supervisors could still fill out the I-9 form at the building site if management was unavailable (Tr.664). However the documents had to be turned in to management and brought to the office within 48 hours (Tr.664-65). If the person was hired in the field, only copies were turned in to the office (Tr.665). The second time she worked there they preferred upper management rather than supervisors to do the hiring (Tr.690).

Brann was also the person who accepted INS' first subpoena from Agent Wheeler in April 1995 (Tr.665). After Wheeler took the documents, Sunshine tried to contact him to find out how things looked (Tr.666). Wheeler called about two weeks after that and when she asked him he said there were a few paperwork errors, but other than that everything looked good (Tr.667-68). She advised Franklin about the conversation (Tr.678). She remembered the name Cesar Hernandez vaguely, but did not recall the particular individual (Tr.670-71).

Brann testified that she went to all the managers' meetings in April, May, and June of 1995 and that nothing was ever said about changing the work schedule to hide illegal aliens or about what to do if INS came to a work site (Tr.669). However she did not attend the meetings of the area managers with their supervisors (Tr.683). Brann said she never intentionally allowed a prospective employee to present an incomplete I-9 and she never filled out an I-9 herself without obtaining information from the prospective employee (Tr.674-75). She would not ever hire anyone who presented a social security card that was stamped "Not Valid for Employment" (Tr.670).

Steven Franklin

Sunshine's president Steven Franklin testified that in the company's earliest days he did all the hiring himself (Tr.699-700,753). As the company grew larger, that changed. At the time of the events in question the general practice was that Sunshine's employment packet would be given out by managers and supervisors to the prospective employee to be filled out (Tr.50). At that time there was no Spanish language version of the application (Tr.51). The I-9 form could be filled out by assistant supervisors, supervisors, contract managers, or any of the office staff (Tr.66). Prior to the Cherry Creek contract in 1994, the hiring was done both in the field and in the office, with probably the majority done in the field (Tr.725).

In 1994 Sunshine had obtained a major contract to provide janitorial services for four Cherry Creek High Schools: Cherry Creek High School, Smoky Hill High School, Eaglecrest High School, and Overland High School (Tr.703-04). Smoky Hill and Cherry Creek are the largest of the four schools with the most activities, and Overland is the smallest (Tr.722). The new contract was for one year, renewable at the option of the school district. The start-up date for that contract was July 1, 1994 (Tr.704,758). The first thing Franklin did to prepare was to hire a consultant (Tr.707), then he looked for a manager. Henry Moret was initially hired 45 days prior to the start of the contract¹⁰ to be the manager for these high schools (Tr.713). Franklin spent several days with Moret going over the entire contract (Tr.725). The next step was hiring four supervisors, one for each school (Tr.725). Initially all the management people were trained by Franklin (Tr.722,727,772), but once the contract was up and running, it was Henry Moret's job to hire, fire, and train the su-

¹⁰Sunshine's records show his hire date to be June 20, 1994 (CX22, p.26).

pervisors (Tr.728–729,764). Henry's brother, Nathan Moret, was hired on September 2, 1994 as the supervisor at Eaglecrest (Tr.357) (CX22, p.26).

Franklin himself was involved in hiring Henry Moret as the contract manager and in hiring the four initial supervisors, but not in the hiring of the other employees (Tr.761). He did the training for the initial four supervisors (Tr.772), but their successors would have been trained by the contract manager or by the departing supervisor (Tr.772). The hiring of the employees for the new 1994 contract was done either at the specific facility or at the office (Tr.48). Most of it was probably done in the office because the staff was put together before they actually went into the schools (Tr.758). Henry Moret was not involved in the initial hiring of employees (Tr.763). Managers were not given extra training in how to hire. (Tr.763). They needed 65 new people in a very short period of time, so they advertised extensively (Tr.708).

The Cherry Creek contract was renewed for the following year (Tr.711–12). There was also a new contract for 15–17 elementary schools which started on July 1, 1995 (Tr.712) and Sunshine had to hire 40+ people for those schools (Tr.712,759). The high schools were used as locations for hiring. Around the same time, Sunshine also had been awarded contracts for some nearby medical buildings (Tr.760). The high schools were utilized for interviewing and hiring for these as well. The hiring was done by Henry, Nathan, and the supervisors (Tr.760). The plan was to funnel the more experienced people over to the elementary schools and replace them with new hires at the high schools where there was supervision on site (Tr.760–61). In 1995 Franklin provided additional training for the managers to improve the process because they had already had the first INS subpoena by then (Tr.764). Prior to July 20, 1995, there wasn't much training on how to complete the employment packet (Tr.67). Contract management was briefed by Franklin or by office staff, and supervisors or assistant supervisors would be informed by the contract manager (Tr.67). The managers would then train the supervisors (Tr.764). Whoever hired an employee would complete the package and return it to the main office (Tr.51). Prior to the employer sanctions operation on July 20, 1995 no one in the main office reviewed the packet (Tr.51).

Franklin denied that he ever encouraged the hiring of illegal aliens (Tr.711) or that he ever told anyone to alter the work sched-

ules to hide illegal workers (Tr.735). He testified that the time sheets for the spring of 1995 gave no indication that there had been any such alteration in the schedule or that any employees had been reassigned from Friday to Saturday (Tr.793). He had no idea there were so many illegal workers at Sunshine (Tr.778–79) and when he learned of it he made many changes such as providing additional training, trying to get the people hired in the office instead of in the field, restricting the I–9 preparation to managers, and eventually restricting hiring in the field altogether (Tr.741–43). There were some changes made in 1995 after the meeting with Agent Wheeler (Tr.68). There was additional training for contract managers and office staff on how to prepare the I–9s correctly. Supervisors were not present however (Tr.739–40). There was another meeting this year about changes in policy after Sunshine was told that illegal aliens were still being hired (Tr.69). After that all hiring was done by contract managers or office staff (Tr.70). There was always a lot of hiring because of the very high turnover rates which are common in the industry (Tr.705–06).

Henry Moret was reassigned from the school contract about October 10, 1995 (Tr.751) and left the company about a month later (Tr.751–52). He was fired (Tr.732). Franklin did not believe that Henry Moret knowingly hired illegal aliens (Tr.731) but he did believe that Moret signed I–9s by looking at copies of documents provided to him by supervisors (Tr.777). Franklin’s personal belief is that Sunshine was set up by the INS and that the confidential informant rather than Henry Moret was the person responsible for the hiring of the unlawful workers (Tr.750–51).

Doris Casey and Cindy Erazo

Doris Casey and Cindy Erazo testified in detail as to Sunshine’s current hiring practices. They were hired in May and July of 1997 respectively (Tr.602,633) and apparently have no personal knowledge of the hiring practices during the period at issue in this case.

Neither Henry nor Nathan Moret was among the witnesses.

B. Other Evidence

Sunshine also submitted various items of documentary evidence including employment applications of persons rejected for employment since July 20, 1995 (RX F1–83), employment records and other

documents pertaining to former employees including INS forms captioned “Sworn Statement” and “Record of Deportable Alien” and time sheets for the high schools during the spring of 1995 (RXKK).

VII. Discussion and Analysis

The quantum of proof in a civil employer sanctions proceeding is a preponderance of the evidence. 8 U.S.C. §1324a(e)(3)(c). It is thus the government’s burden to establish by a preponderance of the evidence that it is more likely than not that its allegations as to each of the remaining issues are true.

A. Whether Any of the Individuals Named in Counts I–IV Was Unauthorized for Employment

Agent Wheeler testified that he had checked the information on Martina Herrera’s I–9 form (CX24) and had obtained printouts from the INS Central Index System which demonstrated that there was no record of Herrera’s admission to the United States either by name or by the number appearing on her I–9 (CX25,26). Further, Wheeler explained, the alien number on her I–9 form had only seven digits, rather than the required eight, so he knew before he put the number in the system that it was not a valid number (Tr.147–50). Similarly, with respect to Leobardo Duarte, Wheeler took the alien number from his I–9 form (CX27), put it in the Central Index System, and found that the number had not been issued to anyone (CX28) (Tr.151–52). As to Maria Garcia Munoz, he checked the Central Index System for the alien number listed in her I–9 form (CX29) and found that it had been issued to a man from Mexico named Victor Manuel Gutierrez (Tr.154–55) (CX30). He also checked the alien number on the I–9 for Victor Hernandez (CX31,32) and found it had never been issued to anyone. He knew before he checked that it had not, because numbers beginning with the digits 9–8 have not yet been issued at all (Tr.155–56). For Pilar Flores, he did the same thing and found that the number on her I–9 (CX33) belonged to a man named Sergio Rios Castillo (CX34). Moreover, he testified, the social security number she used was one which had never been issued to anyone (Tr.157–58). This evidence was un rebutted and is sufficient to demonstrate that INS had never authorized any of those individuals for employment. Accordingly I find by a preponderance of the evidence that Martina Herrera, Leobardo Duarte, Maria Garcia Munoz, Victor Hernandez, and Pilar Flores

were aliens not authorized for employment in the United States at any time during their employment with Sunshine.

B. Whether Sunshine hired Mario Garcia Chavez and/or Miguel Velasquez Rodriguez for employment and whether they were unauthorized for employment

Wheeler also testified about Mario Garcia Chavez's employment with Sunshine and provided documentary evidence (Tr.161–62). Mario Garcia Chavez had previously been apprehended by INS on July 11, 1995 and he was informed at that time that since he had no authorization to work, he was not to return to work. He was already in deportation proceedings at the time he was thereafter arrested on July 20, 1995 while working at Cherry Creek High School (CX67). His name and social security number appear on Sunshine's report of worker wages for the third quarter of 1995, and wages are reported for him during that quarter (CX68, p.19). His name and social security number also appear on Sunshine's computer list of workplace assignments dated July 24, 1995 (CX22, p.19) and that document shows a hire date of May 31, 1995. This evidence was unrebutted. I find that Sunshine hired Mario Garcia Chavez for employment after November 1986 and that Mario Garcia Chavez was at all times relevant to this action an alien not authorized for employment in the United States.

I also find that Miguel Rodriguez Velasquez was an alien not authorized for employment in the United States. The evidence is in conflict, however, as to whether Sunshine ever hired him for employment in the United States. His aunt, Isabel Arenas, testified that he worked there "a few days" (Tr.462–63). His father, Victor Hernandez Picazo, testified to that as well (Tr.434). On the other hand, his own statement to Agent Wheeler at the time of his arrest at Smoky Hill High School on July 20, 1995 was that he was there attempting to get a job (RXBB). His father gave a statement that day in which he referred to a cousin and brother of his who also worked at Sunshine, but he evidently never mentioned his son (RXZ). Miguel Velasquez Rodriguez' name appears nowhere on any of Sunshine's lists of employees or on the report of worker wages for the third quarter of 1995, and there is no I–9 form, no W–4 form, no employment application or any other written evidence in the record which identifies him as an employee of Sunshine.

While I found Isabel Arenas to be a generally credible witness, the source of her personal knowledge on this point is not clear. Victor Hernandez Picazo and his brother Tomas both made a number of contradictory statements and neither was a very convincing or credible witness, each apparently inclined to say whatever seemed advantageous at any particular time. I am reluctant to make findings based on their testimony in the absence of other substantial corroborating evidence and accordingly find the evidence is insufficient to show that Miguel Velasquez Rodriguez was hired for employment at Sunshine.

C. Whether Sunshine Knowingly Hired Illegal Aliens

1. Standards for Proving a “Knowing Hire” Violation

An employer’s or agent’s knowledge of an employee’s immigration status may be proven by a showing of either actual or constructive knowledge. *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307, at 37–38 (1991). The term “knowing,” even when used in criminal statutes, is not limited to positive knowledge but includes the state of mind of one who acts with an awareness of the high probability of the fact in question, such as one who does not possess positive knowledge only because he consciously avoids it. *United States v. Jewell*, 532 F.2d 697, 702 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976) (deliberate failure to investigate suspicious circumstances imputes knowledge). OCAHO jurisprudence in cases dealing with employer sanctions has acknowledged that constructive knowledge is the appropriate standard. *United States v. New El Rey Sausage Co., Inc.*, 1 OCAHO 66, at 411, *modified on other grounds by the Chief Administrative Hearing Officer*, 1 OCAHO 78 (1989), *aff’d*, 925 F.2d 1153 (9th Cir. 1991). When an employer is in possession or on notice of such information as would lead a person exercising reasonable care to acquire knowledge of an employee’s unauthorized status, the employer thus may be found to have reason to know that the employee is unauthorized to work.

An employer is accordingly not entitled to cultivate deliberate ignorance. Regulations applicable to knowing hire violations provide that:

The term “knowing “ includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) fails to complete or improperly completes the Employment Eligibility Verification Form I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

8 C.F.R. §274a.1(l)(1).

OCAHO case law makes clear that the mere failure to complete the paperwork requirements correctly, standing alone, is not sufficient to establish knowledge without other probative evidence. *United States v. Valdez*, 1 OCAHO 91, at 610 (1989). Where, as in *Valdez*, the failure is coupled with circumstantial evidence of a conscious avoidance of acquiring knowledge as to the identification and status of one's employees, it may be sufficient to show constructive knowledge. *Accord United States v. Alaniz*, 1 OCAHO 297, at 1967 (1991).

As was observed in *Jewell*, 532 F.2d at 701 n.11: “[K]nowledge is not something that you can see with the eye or touch with the finger.” It is rarely possible to prove it by direct evidence. There is seldom eyewitness testimony to an employer's mental processes. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). As in any lawsuit, the complainant may prove its case by direct or circumstantial evidence. A trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. *Id.* at 714 n.3. Because knowledge, as Judge Posner has observed about intent, “is a mental state and mind reading not an acceptable tool of judicial inquiry,” *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994), the usual method of proof of knowledge is by circumstantial evidence.

2. Application of the Standard to the Evidence

The government accordingly relies, as it must, principally upon circumstantial evidence to establish Sunshine's knowledge of the unauthorized status of its workers. Among the facts and circumstances which INS contends support its allegations are the delega-

tion of authority to hire employees and complete I-9 forms to individuals who obtained and ignored information about false identities and documents, the inadequate training of personnel to whom hiring authority was delegated, and many specific actions by Henry Moret, including instructing supervisors to alter work schedules to hide illegal aliens, helping individuals to obtain false documents, and specifically authorizing subordinate supervisors to hire unauthorized workers. INS also points to the fact that one of the questions on Sunshine's employment application is "Are you prevented from lawfully becoming employed in this country because of visa or immigration status?" and the employment applications completed by many of the unauthorized employees indicate that they checked "Yes" in response to this question, including Octavio Murillo (Hernandez) (CX4) (Tr.54) Isabel Arenas (Salazar) (CX5) (Tr.57), Hugo Villegas (Corral) (CX6) (Tr.62), Mario Garcia (Chavez) (CX2) (Tr.164), Rosalia Jimenez Diaz (CX55), and Doris Aguirre (de Erazo) (CX56) (Tr.385).

Sunshine attacks the credibility of the former employees who acted as government witnesses, and also objects to reliance on the INS-generated Sworn Statements and Records of Deportable Alien (Form I-213)¹¹ because they are hearsay, not subject to cross-examination, and contradicted by the testimony. As was noted in *United States v. Y.E.S. Indus., Inc.*, 1 OCAHO 198, at 1316 (1990), however:

It is well settled that hearsay may constitute substantial evidence in administrative hearings if factors assuring the underlying reliability and probative value of the evidence are present. *Gimbel v. Commodities Futures Trading Comm'n*, 872 F.2d 196, 199 (7th Cir. 1989), citing *Richardson v. Perales*, 402 U.S. 389 (1971). The various factors which are helpful in such an analysis include the possible bias of the declarant, whether the statements are signed or sworn to as opposed to oral, or unsworn, whether the statements are contradicted by direct testimony, whether the declarant is unavailable and no other evidence is available, and finally, whether the hearsay is corroborated. *Richardson*, 402 U.S. at 402.

I have assigned weight to these forms principally where they tend to corroborate the other testimony. In a few instances the statements have undermined the testimony of a particular witness. For exam-

¹¹Because many of these government forms were offered into evidence by Sunshine itself, I consider the objection as going to the weight rather than the admissibility of the documents.

ple, I found much of the testimony of Tomas Hernandez Picazo and Victor Hernandez Picazo to be unworthy of belief based in part upon the differences between their testimony at the hearing and the statements they initially gave when they were arrested. Their demeanor in testifying, particularly that of Tomas Hernandez Picazo, also was such that it did not inspire confidence because it was evasive or less than direct. On the other hand, some of the alleged contradictions between the statements and the testimony, such as the fact that a witness previously gave a false name when arrested or refused to make a statement at all, were not necessarily contradictions of the hearing testimony. Agent Wheeler testified that it would not be unusual for a person being arrested to be evasive, nervous, mistaken, or even lie to INS (Tr.194,200), and I have taken this fact into account in assigning weight to the sworn statements and records of deportable alien.

Sunshine's principal attack is on the credibility of the former employees who testified at the hearing, and stems from the fact that they had been permitted to remain and work in the United States during the period prior to the hearing. Sunshine therefore believes that they are biased because they have obtained a valuable benefit from INS. The fact that witnesses benefitted by obtaining temporary work permits does not necessarily lead to the conclusion Sunshine draws, that all the former employee witnesses were lying in order to help the INS. To the contrary, I found that for the most part that their testimony was true and corroborated by other evidence.

It was clearly shown, for example, that Henry Moret's usual and customary practice in overseeing the hiring for the school contracts was not to examine or even to require the presentation of original documents to verify a prospective employee's identity and work authorization, and that his instructions to subordinate supervisors under his authority were to make copies of the employees' documents and attach them to the employment application or put the copies in the desk. Even Franklin conceded that it was not Moret's practice to examine the employees' documents. Although Moret told Agent Wheeler that he routinely examined the employees' original documents, it was shown that in fact, to the extent any examination of the documents was done at all, that task was left to low-level subordinates who were not instructed to examine the documents but to get copies of them. In some instances no document was examined by anyone, and numbers were simply entered on the form. In at least one instance when it was reported to Moret that documents didn't

look right, he instructed the supervisor to get copies and not concern himself with whether the documents were genuine.

Although Henry Moret attested under the penalty for perjury on numerous I-9 forms that he examined original social security cards or other documents to verify the identity and employment eligibility of new employees, the testimony of Sunshine's former employees was persuasive that the facts were otherwise. For example, neither Doris Aguirre nor Rosalia Jimenez even had a social security card according to their statements. Aguirre had a number written on a piece of paper and Jimenez also just wrote down a number which was given to her; yet Moret attested under penalty of perjury that he examined their original social security cards. Cesar Hernandez said he photocopied his former roommate's son's social security card with his own name superimposed over the child's name, and showed the copy to Danielle Brann, not to Henry Moret. Yet Moret attested that he examined Hernandez' original social security card on the day he was first hired in June 1994. Hernandez' mother, Isabel Arenas testified that she showed a counterfeit card to Danielle Brann and that Brann copied it on June 30, 1994. She subsequently left her documents at work overnight about a month later, but Henry Moret attested that he examined her original social security card on June 30, 1994, a month before she left the documents. Alfredo Alvarado Montiel testified that he was called on the telephone for his social security number but not asked for the card itself; Henry Moret attested that he examined his original social security card on October 1, 1994. Eumelia Ramirez Madrigal said she made copies of her documents herself and put them with her application, that she never showed anyone at Sunshine her originals and that she never showed any documents at all to Henry Moret; he attested under penalty of perjury that he examined her original social security card. Guadalupe Rodriguez Diaz gave a statement in which she too stated that she had made copies of her own documents and was not asked for originals; Henry Moret attested under penalty of perjury that he examined her original social security card and Colorado ID. Maria Esperanza Ramirez Madrigal gave two conflicting statements. First, when she was arrested, she claimed to have presented genuine documents but later she admitted that she had simply put down her daughter's social security number. Henry Moret attested that he examined her original social security card. Moret also attested on March 10, 1995 that he examined an original social security card for Rafael Perez-Gonzales, but according to Perez-Gonzalez' statement he didn't even buy the card until May 1995, two months later. Arturo

Villegas Castaneda gave a statement saying that he never showed any documents at all to anyone at Sunshine, and Lucia Estella Velasquez denied she showed any documents to Henry Moret; Moret nevertheless attested under penalty of perjury that he examined their documents.

Henry Moret also attested under penalty of perjury that he examined the alien registration card and original social security card of Pedro Antonio Herrera Olaque on July 25, 1995, five days after Herrera was arrested. Herrera's statement shows that his counterfeit alien registration card and social security card were in his possession at the time of his arrest on July 20, 1995 and appear to have been confiscated by INS that day. How Henry Moret could then have examined them five days later is unexplained. The documents themselves are not in the record, but Herrera said they were easy to tell from the good ones.

In several of the I-9 forms signed by Henry Moret, I note also that his signature appears to have been written on top of the signature of an employee who evidently had mistakenly signed the employer attestation in Section 2 of the I-9 Form before Moret had a chance to sign it. The forms for Isabel Arenas Salazar, Daroly Arenas Silva, Lucia Estella Velasquez, Guadalupe Rodriguez Diaz, Claudia Mendez Beltran, Hugo Villegas (Corral), Maria Esperanza Ramirez, and Arturo Villegas all show the employee's signature in the employer attestation box overwritten with that of Henry Moret. In both the I-9s for Cesar Hernandez his signature is overwritten, on one by Henry Moret and on the other by Danielle Brann. That these employees all signed the employer's attestation in Section 2 as well as the employee's attestation suggests that no one explained the form to them, and that they may not have known what they were signing. Some employees signed or entered their own names in the box for the translator's certification as well. Some of the I-9s appear to have been altered, for example the date 7/1/94 is plainly written over the date 4(?)–10–95 in the employer attestation portion of Murillo's I-9.¹²

¹²It is also particularly disturbing to note that in a few instances where duplicate I-9s were inadvertently entered into the record they turned out not to be duplicates at all. Sunshine's copies of I-9s for Octavio Murillo Hernandez and Carlos Jesus Bernal Alvarado show boxes checked indicating that each was both a United States citizen and a lawful permanent resident alien, but INS' copies of the same I-9s show one of those boxes crossed out on both forms. When and by whom the alterations were made is unknown. There is also a discrepancy between Sunshine's and INS' copies of the I-9 for Rosalia Jimenez Diaz in that INS' copy shows a deletion of material which is not deleted on Sunshine's copy.

Danielle Brann attested under the penalty of perjury that she examined Natalia Montiel's original social security card (other than a card stamped "Not Valid for Employment") on July 13, 1994. She also testified that she would never hire an individual whose social security card was stamped "Not Valid for Employment." Natalia Montiel met with Brann on June 30, 1994 and started work at Sunshine that same day. Her original social security card prominently displays the words "Not Valid for Employment." Montiel herself testified, and I credit, that she showed her card only to Lili and Virginia, and to no one else at Sunshine. I found Montiel to be a straightforward and honest witness who told the truth to the best of her ability. The only logical inferences from these facts are either that Brann did not examine the original document, or, if she did, that she ignored the restriction. It defies credulity to hypothesize that Montiel had two original social security cards bearing the same social security number, one with and one without the restriction. I therefore conclude that Brann's attestation is false.

Estela Gamma likewise attested under the penalty of perjury on an I-9 form that she examined an original social security document for Carlos Jesus Bernal. Two witnesses testified that when Carlos Bernal started at Sunshine in October 1995, Henry Moret was specifically told that he had no papers; he stated that he never showed his social security card to anyone at Sunshine, or any documents at all to Estela Gamma. In fact, when Bernal started at Sunshine he didn't even have a social security card or a number. First he applied for a nonwork social security number and obtained a receipt. Only after Henry Moret said he needed a number to get paid did he go to the social security office and get a computer printout with an assigned number. Only some time after that did he get the card, which prominently displays the words "Not Valid For Employment." The I-9 Form indicates that Gamma examined a Colorado ID and "Social Security SS Administration 523-97-7265," evidently the computer printout, on October 16, 1995. The attached computer printout containing that number appears to be dated October 18, 1995. Bernal testified that the copy of the printout was incomplete because the portion stating it was a nonwork number was cut off.

Danielle Brann also attested under penalty for perjury that she examined an original ID and social security card for the second I-9 for Cesar Hernandez, completed on December 20, 1994. A line is drawn through both these entries and a box is also checked for an alien registration card, but no alien number is listed. Danielle Brann's signature is written over the crossed-out signature of Cesar Hernandez in the employer attestation certification in Section 2. This I-9 is the one completed after Hernandez had been suspended when Guadalupe Saenz called Sunshine complaining about his use of her minor son's social security number. Hernandez' testimony was that Brann teased him by asking whose number the new one was, implying that she knew him and was aware of the incident. I find it more probable than not that Henry Moret and Danielle Brann both knew Hernandez, both knew about the complaint made by Saenz, both knew that he had used two different social security numbers while working at Sunshine, and both knew that he was unauthorized for employment. If they did not know from the beginning of his employment that he was unauthorized, they were certainly put on notice by the call from Guadalupe Saenz. Yet Sunshine not only rehired and continued to employ Cesar Hernandez, Henry Moret offered him jobs as assistant supervisor and as supervisor.

Although Henry Moret's signature appears on Hernandez' first I-9 dated June 30, 1994, Hernandez' testimony and his mother's was that June 30, 1994 was the day they first went to Sunshine where they were hired not by Henry Moret but by Danielle Brann and sent by her to work at Smoky Hill High School. That same day he showed Danielle Brann the photocopied social security card about which Guadalupe Saenz later called and complained. He testified and I credit that he knew Danielle Brann, and that she knew him because he used to go to the office to pick up his check. The incident with Saenz was also widely known at Sunshine. When Hernandez later spoke with Benito, a supervisor at Cherry Creek whose last name he didn't know, he found that Benito already knew about the incident. After he talked to Henry Moret, Benito hired Hernandez to be his assistant supervisor, and later Henry Moret offered him a supervisor's job at Overland.

Although Sunshine's witnesses said that prior to July 20, 1995 supervisors had the authority to hire employees and to complete I-9 forms, the forms for the unauthorized employees in this proceeding

were not completed by supervisors.¹³ When Estela Gamma signed the I-9 for Carlos Jesus Bernal on October 16, 1995 she identified herself as “manager.” This was only a few days after Henry Moret was reassigned from the school contract. Gamma was previously a supervisor at Overland, but it appears that she was also Moret’s successor as contract manager. Seventeen of the remaining I-9s are signed by Henry Moret and two by Danielle Brann. There are no I-9s for the other five.¹⁴ Among the other supervisors and assistants identified as working at various times during the period in question were Nathaniel Moret, Alfredo Alvarado Montiel, Alfredo Ramirez Madrigal, Ruben Hernandez, Magdalena Gonzales, Cesar Hernandez, Benito Marta, Guadalupe, Wes and Alberto, Carlos, Juan, and Anthony Chavez. Yandric testified that if documents were examined by a supervisor, the supervisor would sign the I-9. None of those supervisors signed any of the I-9s or attested to examining any documents. Witnesses who had acted in the capacity of first line supervisors testified that their instructions from Henry Moret were to make copies of the employee’s documents and either associate the copies with the employment application or put them in the desk. They were not instructed about how to examine the documents or how to complete I-9 forms. At least two people who acted in supervisory positions at Sunshine at various times were illegal aliens themselves.

Many of the employees at the high schools were unauthorized and knew others who were as well. It appeared to be general knowledge at least among some of the employees that there were many illegal aliens working for Sunshine, although other employees denied knowing it. One of the witnesses explained that “[a]ll the people that worked there worked here illegally.” Another said there were ten illegal workers at her school. Similarly in one of the Sworn Statements, the answer to the question “Are there other illegal people working at this company?” is simply “Everybody” (sic).

¹³Similarly, of the 19 employees whose I-9s were found to contain paperwork violations, seven were signed by Henry Moret, the contract manager for the schools (RXGG, pp. 2,3,5,8,9,11,12); six by Danielle Brann, the office manager (RXGG, pp. 13,14,15,17,18,19); and four by other managers (one by Steve Yandric, an area manager, one by Cesar DiPaulo, also identified as an area manager, one by Kelly Vera, office manager, and one by Rudy or Randy last name illegible, contract manager.) (RXGG, pp. 1,4,7,16). Only one was signed by a supervisor, Maria Flores. (RXGG, p.6) The remaining I-9 in this group has no signature at all (RXGG, p.10).

¹⁴The numbers add up to twenty-five because there were two I-9s for Cesar Hernandez.

The pervasiveness and openness of the practice of hiring unauthorized aliens and their sheer numbers made it highly likely that the practice was common knowledge among both employees and supervisors. Alfredo Alvarado testified that he personally told Henry Moret that Carlos Bernal and Tomas Hernandez Picazo were illegal. Moret also knew that Soledad Peña was illegal; witnesses stated that he even helped her to buy her documents for \$70. He also knew that Cesar Hernandez was illegal and had used false social security numbers. He knew Eumelia Ramirez Madrigal was unauthorized because she told him she wouldn't be working at Sunshine at all if she had good documents. As to these individuals Henry Moret had actual knowledge that they were unauthorized for employment.

While knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent, 8 C.F.R. §274a.1(l)(2), the fact that a number of Sunshine's employees spoke no English at all could not have escaped Moret's notice. Sunshine, through Moret, knew many employees spoke only Spanish; it was he who chose to recruit workers by advertising on the Spanish language radio station. Although the fact that an employee answered yes to a question on the application form asking if he or she was ineligible for work in the United States, or inadvertently signed the employer attestation portion of the I-9 form, or attested to being both a United States citizen and an alien lawfully admitted for permanent residence, may alone be insufficient to put an employer on notice of the employee's status, when coupled with other circumstantial evidence it helps to put the employer on notice that a given employee may be unauthorized for employment.

As to each person whose I-9 form Henry Moret or another manager falsely signed without examining documents, moreover, Sunshine had a duty to make inquiry to ascertain that person's employment eligibility. As explained in *New El Rey Sausage Co., Inc. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991):

Contrary to the argument of *New El Rey* that the government has the entire burden of proving or disproving that a person is unauthorized to work, IRCA clearly placed part of that burden on employers. The inclusion in the statute of section 1324a(b)'s verification system demonstrates that employers, far from being allowed to employ anyone except those whom the government had shown to be unauthorized, have an affirmative duty to determine that their employees are authorized. This verification is done through the inspection of

documents. Notice that these documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to adequately ensure that the alien is authorized.

Moret had nearly unlimited authority as the contract manager to hire employees; either recklessly or by design he abandoned his own responsibilities to subordinate supervisors who in some instances did not speak English, did not understand the requirements of the verification system or were themselves aliens not authorized for employment in the United States. Such reckless disregard for the consequences of permitting other persons to introduce unauthorized workers into the workplace can amount to constructive knowledge. When an employer or agent acts with reckless and wanton disregard for the legal consequences of permitting another to act on its behalf, or to bring in unauthorized workers, the employer may be charged with constructive knowledge. *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307, at 39 (1991). *Cf. United States v. American Terrazzo Corp.*, 6 OCAHO 877, at 10–11 (1996).

I also find that Henry Moret signed I–9 forms with a “reckless disregard of the truth and with the purpose to avoid learning the truth.” *United States v. Tamargo*, 637 F.2d 346, 351 (5th Cir.), *cert. denied*, 454 U.S. 824 (1981). He had to go out of his way to avoid knowing the immigration status of Sunshine’s employees and had to deliberately disregard specific information given to him about particular individuals. His conduct demonstrated deliberate indifference to the immigration status of prospective employees and a conscious choice to hire without regard to their status. The conduct went well beyond mere negligence and demonstrates that whatever Sunshine’s official policy was, Moret’s own policy, custom, and practice as contract manager was to make the paperwork look right and to turn a blind eye to the question of whether or not a given employee was actually eligible for employment in the United States.¹⁵

¹⁵His concern with the appearance of the paperwork is also reflected in the records of some of the employees arrested by INS on July 20, 1995 and returned to Mexico. Sunshine’s records indicate that some of these employees were terminated on July 20, 1995 for giving false documentation to the company (CX4,5,6,50). It is unclear when these records were made. An accompanying memorandum dated July 24, 1995 reads “Steve Here are the [term.?] sheets on all employees thus far who have not shown up & or deported (sic). Look for deductions on aprons and pagers. Thanks Henry.” The supervisor in each case is identified as Henry Moret.

Either implicitly or explicitly, he authorized lower-level supervisors under his direction to hire unauthorized workers. Even after INS conducted the employer sanctions operation in July 1995, he authorized the hiring of Carlos Jesus Bernal in October after specifically being informed that Bernal was unauthorized.

Based upon a preponderance of the evidence I find that Henry Moret, Danielle Brann, and Estela Gamma signed false attestations. I find that Henry Moret had actual knowledge that Carlos Jesus Bernal, Tomas Hernandez Picazo, Cesar Hernandez, and Eumelia Ramirez Madrigal were unauthorized for employment in the United States. I further find that Henry Moret had constructive if not actual knowledge of the unauthorized status of each person for whom he signed a false I-9 form: Isabel Arenas Salazar, Maria Esperanza Ramirez Madrigal, Doris Aguirre de Erazo, Alfredo Ramirez Madrigal, Rosalia Jimenez Diaz, Arturo Villegas Castaneda, Guadalupe Rodriguez Diaz, Pedro Antonio Herrera Olaque, Lucia Estella Velasquez, Octavio Murillo Hernandez, Claudia Mendez Beltran, Rafael Perez Gonzales, Ernesto Garcia Carbajal, Daroly Arenas Silva, Hugo Arturo Villegas Corral. He had constructive knowledge of the unauthorized status of Victor Hernandez Picazo, hired at the same time as his brother Tomas, because Victor Hernandez Picazo was hired after telling his supervisor, Alfredo Alvarado, that he was undocumented; Alvarado hired him anyway having been previously authorized by Henry Moret to hire without regard the immigration status of the employee. I find that Danielle Brann had actual knowledge of the unauthorized status of Cesar Hernandez and also had constructive knowledge if not actual knowledge of the unauthorized status of Natalia Montiel de Alvarado.

I make no findings with respect to the allegation that the reason work schedules were altered in the Spring of 1995 was to conceal the presence of unauthorized workers. The evidence failed to show why employees were reassigned from Friday to Saturday. Although Franklin testified that some of the school employees worked Saturdays because they had to have Saturday coverage, I also note that Sunshine's own handwritten list of work assignments as of April 1995 showed only Monday through Friday hours scheduled for all the employees assigned to the schools. The work schedules therefore do appear to have been altered at some point in the Spring of 1995 to add Saturday hours. I also find that Henry Moret instructed the school supervisors in the Spring of 1995 how to use a code to page him immediately if INS came to any of their schools.

There are some employees for whom it does not appear that any I-9 form was ever completed, so that no one at Sunshine attested to examining any documents to confirm their identity or employment eligibility. As to three of these employees, Mario Garcia Chavez, Angeles Solis Cortez, and Carlos Arenas Avila, there is minimal evidence beyond the mere failure to complete the I-9 that any specific manager or supervisor at Sunshine knew or should have known of their status.

Carlos Arenas Avila was arrested on July 20, 1995. The INS Record of Deportable Alien reflects only that he said he had been hired by Ruben at Cherry Creek School “yesterday.” The same form for Angeles Solis Cortez indicates that she was hired July 17, 1995 and did not fill out Form I-9. It asserts further that she bought a social security card and resident alien card for \$100 and showed them to “her employer,” but no individual’s name was given. Her sworn statement says she didn’t know the name of her supervisor or of the company. The allegation that Mario Garcia Chavez was knowingly hired rests entirely upon Sunshine’s failure to complete an I-9 form for him and the fact that in completing his application for employment he checked “yes” in response to the question “Are you prevented from being employed in this country because of Visa or Immigration Status?” As to these three individuals I find the evidence insufficient to show that any specific person at Sunshine knew or should have known that the particular employee was unauthorized for employment in the United States.¹⁶

I credit Franklin’s testimony that he did not have personal knowledge of the illegal status of most of these employees. He was not really very knowledgeable about I-9 compliance in 1994 and mid-1995 because he simply had other priorities. He was concerned that Sunshine not lose the school contracts. That is not to say, however, that he made reasonable efforts to ensure that persons to whom hiring authority was delegated by managers acquired minimal knowledge of the requirements for demonstrating eligibility to work or of the mechanics for complying with the law. At least until July 1995, there was seemingly very little interest

¹⁶INS argues that a “yes” answer to the question on the employment application is sufficient to put Sunshine on notice that the employee was unauthorized. Sunshine’s witnesses simply assumed the employees who answered “yes” to that question were confused. The fact that Sunshine continued to ask the same question for years in the face of multiple affirmative answers suggests that in reality no one really read or paid any attention either to the question or to the answer.

taken at the upper levels in I-9 compliance. The form was simply one of several handed out with the employment packet. If an employee was hired in the field, the forms in the packet were simply sent back to the office and evidently never reviewed by anyone. Even the applications themselves do not appear to have been very carefully reviewed.

In any event, the respondent in this case is not Steve Franklin, but Sunshine Building Maintenance, a corporation. It is not Franklin's personal knowledge which is at issue. Unlike a natural person, a corporation can operate only through its agents. The term "employer" means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. 8 C.F.R. §274a.1(g). Henry Moret was clearly Sunshine's agent, and Moret's knowledge is Sunshine's knowledge. An employer is chargeable with and bound by the knowledge of an agent acting within the scope of his employment and exercising the authority actually delegated to him. *United States v. Land Coast Insulation, Inc.*, 2 OCAHO 379, at 677 (1991), *Y.E.S., Indus. Inc.*, 1 OCAHO 198, at 1319. Henry Moret had actual knowledge of the unauthorized status of some of these workers, and as to the others he displayed a total disregard for substantive compliance with the requirements of the employment eligibility verification system, focusing instead on making the paperwork look right. Just as a taxpayer may not avoid liability for a false tax return by having another complete it, *United States v. Walker*, 896 F.2d 295, 299 n.9 (8th Cir. 1990), Sunshine cannot escape liability for its hiring practices by disclaiming responsibility for Moret's acts.

VIII. *Sunshine's Proposed Affirmative Defenses*

A party asserting an affirmative defense bears the burden of proof as to all the elements necessary to establish the defense. Sunshine had previously alleged affirmative defenses of good faith and waiver or estoppel, in response to which INS filed a motion to strike. Four days prior to the hearing, Sunshine filed a motion seeking leave to amend to add the defense of entrapment. Rather than opposing this motion, INS filed another motion to strike. These motions were taken under advisement and the respondent was given the opportunity to submit its evidence.

A. Statutory Defense of Good Faith

1. Standards for Proving the Affirmative Defense

Hiring an individual knowing that person to be an alien without authorization to work and failing to verify an employee's work authorization documents constitute distinct and separate offenses. They are not entirely unrelated in that an employer who has complied in good faith with the requirements of the employment eligibility verification system may under appropriate circumstances be able to establish a statutory affirmative defense to the knowing hire violations described in (a)(1)(A). 8 U.S.C. §1324a(a)(3). Congress carefully crafted the law imposing sanctions for the hiring of unlawful workers to limit the burden and the risk placed on employers. *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991). Compliance with the record keeping requirements is satisfied when an employer examines the specific document or documents set out in the statute and regulations to establish an individual's identity and employment eligibility, and attests under the penalty for perjury that the documents reasonably appear to be genuine and to apply to the individual. The employer's duty thus does not require expertise in ascertaining the legitimacy of the documents. Rather, the law requires only that the employer or agent actually examine each specific document to make sure that it appears genuine on its face and that it appears to apply to the particular individual. The law requires no more than a reasonable effort to ascertain whether the document in question is authentic. See H.R. Rep. No. 99-682(I), at 61-62 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5665-66. It permits, but does not require, an employer to copy the documents presented and to retain copies with the completed I-9 form. 8 U.S.C. §1324a(b)(4).

The Judiciary Committee Report on the statute shows that Congress did not intend the statute to require employers to become experts in identifying and examining a prospective employee's employment authorization documents. The Report states that "[i]t is not expected that employers ascertain the legitimacy of documents presented during the verification process." H.R. Rep. No. 99-682 (I) at 61 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5665 (1986). It goes on to say that "[t]he 'reasonable man' standard is to be used in implementing this provision and the Committee wishes to emphasize that documents that reasonably appear to be genuine should be accepted by employers without requiring further investigation of

those documents.” *Id.* at 62, 1986 U.S.C.C.A.N. at 5665. The statute strictly defines an employer’s duty as not including a rigorous inspection but only a verification that documents were examined and appear to be reasonable on their face.¹⁷

2. *Application of the Standards to Sunshine’s Evidence*

Sunshine bases its first affirmative defense upon the assertion that it complied in good faith with the verification system because it had properly completed I–9 forms for 19 of the unauthorized individuals alleged to have been knowingly hired, and because the remaining 5 individuals were very new hires, some so recent that the three-day period to complete the I–9 form had not yet expired. Franklin testified that he trained all the managers including Henry Moret, in the requirements for completing I–9 forms, and Sunshine’s managers testified that its policy was to require employees to present their original documents. Sunshine urges that because the testimony of the former employees should be rejected for reasons of bias, the completed I–9s would then show that Sunshine has established the affirmative defense of good faith by demonstrating its compliance with the employment eligibility verification system.

While preparation of an I–9 form presumptively demonstrates that an employer was presented with documents, *United States v. Cafe Camino Real, Inc.*, 2 OCAHO 307, at 39 (1991), that presumption is rebuttable, and was rebutted successfully in this case. Sunshine’s witnesses agreed that at least prior to July, 1995 supervisors were authorized to hire employees and to sign their I–9 forms. Nevertheless, most of the I–9 forms for the workers alleged to be knowing hires were not completed by their supervisors, but by Henry Moret, the contract manager, and Danielle Brann, the office manager. I found that both had attested to events which never occurred. One I–9 was completed by Estela Gamma who apparently was Moret’s successor as contract manager; I also found her attestation to be false.

¹⁷See also 1 Charles Gordon et al., *Immigration Law and Procedure* §7.04[3][c][i], at 7–41 (1997) (“It seems plain that the employer is not required to be an expert on documents or to engage one. . . . [T]he employer must accept any document or documents listed in the regulations, so long as that documentation appears genuine and, individually or together, meets the tests of identity and eligibility.”).

Franklin testified about his understanding of the difference between genuine and fraudulent documents and stated that before it was explained to him, for example, he was unaware that certain social security numbers had not yet been issued, or which documents used dot matrix printing. Agent Wheeler also testified at length about the difficulty of distinguishing counterfeit social security cards from real ones. He said that if a person pays \$25 for a document on the corner or at a flea market, anyone could probably pick it out, but for \$3,000 it might be very difficult, even for an expert. What Henry Moret or any other manager might have known from looking at an original document does not, of course, become an issue where the evidence persuasively demonstrates that the person signing the attestation never looked at the original document at all.

While the law requires no more of an employer than a reasonable effort to see that a proffered document appears genuine on its face and appears to apply to the individual, that minimal effort must at least be made for an employer to be found in compliance. As Sunshine acknowledged, the first requirement of a good faith defense is for the employer to show that documents verifying the employee's identity and employment eligibility were actually examined. The employment eligibility verification system is not a system in which the employer may escape responsibility by putting numbers on a form to make the paperwork "look right," without examining the original documents as required for actual compliance. Sunshine's proffered defense essentially rests upon the fact that many of the I-9s "look right."¹⁸ In fact, Sunshine questioned Agent Wheeler at length about the I-9s of several of the unauthorized employees, repeatedly posing the question of whether an employer examining the employee's I-9 form would have reason to know that the employee was not authorized for employment. This questioning misses the point. An employer's obligation is not to examine the completed I-9s, but to complete them properly by examining the original underlying documents which establish an individual's identity and work eligibility. This is precisely what was not done here.

¹⁸In some instances the I-9s did *not* look right. Octavio Murillo's I-9, for example, shows two boxes checked indicating that he was both an alien admitted for lawful permanent residence and a United States citizen (Tr.202) (RXT, p.2). Carlos Jesus Bernal Alvarado's (RXH, p.2) had the same problem. Guadalupe Rodriguez Diaz, on the other hand, failed to indicate her immigration status at all (RXQ, p.2). It is unclear why INS chose not to pursue paperwork violations involving the persons involved in the knowing hire violations.

I find that the good faith defense is unavailable to Sunshine because the evidence supports the view that its managers signed the attestations without examining the original documents at all. Henry Moret's attestations were simply false and unworthy of belief. Danielle Brann and Estela Gamma each signed at least one false attestation as well. An employer has not complied in good faith with the employment eligibility verification system when its agents create perjured I-9 forms in order to make their records look correct. A perjured I-9 form is not "properly completed" within the meaning of 8 U.S.C. §1324a(b)(1)(A).

B. Estoppel and/or Waiver

1. The Standards for Proving the Affirmative Defenses

The history of modern decisions addressing the issue of estoppel against the United States is set forth in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419–423 (1990),¹⁹ in which the Court observed that while it had left open the question of whether affirmative misconduct could ever estop the government, it had also reversed every finding to come before it in which a lower court had found estoppel against the government, in some instances summarily, citing *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam), *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam), and *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam). In *Miranda*, the Court observed: "This case does not require us to reach the question we reserved in *Hibi*, whether affirmative misconduct in a particular case would estop the government from enforcing the immigration laws." *Id.* at 19. While the Court in *Richmond*, 496 U.S. at 423–24, left for another day the question of whether an estoppel defense can ever succeed against the government, it is well settled that the government may not be estopped on the same terms as other litigants. *Heckler v. Community Health Servs., Inc.*, 467 U.S. 51, 60 (1984).

¹⁹Since *Richmond*, the circuits have also recognized that there are separation of powers difficulties inherent in any estoppel against the United States. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1348 (5th Cir. 1996) citing, *inter alia*, *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir.1994). Were courts to estop the United States readily, the executive branch could use this doctrine strategically to achieve results Congress intended to prevent, thus delivering lawmaking power to the executive in a manner that the first sentence of Article I does not contemplate. *Id.*

Assuming *arguendo* that the government can ever be estopped, more must be proved than the traditional four elements of estoppel, but those elements must be proved as well. Traditional estoppel doctrine is based on a combination of a misrepresentation of fact coupled with detrimental reliance thereon. It prevents a party from showing a truth contrary to its own misrepresentation of facts after another has relied upon the representation to its detriment. The Tenth Circuit, in which this case was heard, has described the traditional elements as: 1) the party to be estopped must know the facts, 2) the party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended, 3) the party asserting the estoppel must be ignorant of the true facts, and 4) the party asserting the estoppel must rely on the other party's conduct to his injury. *Penny v. Giuffrida*, 897 F.2d 1543, 1545–46 (10th Cir. 1990) (citing *Che-Li Shen v. INS*, 749 F.2d 1469, 1473 (10th Cir. 1984)).

In *FDIC v. Hulsey*, 22 F.3d 1472, 1489–90 (10th Cir. 1994), it was held by the Tenth Circuit that in addition to proving the four traditional elements, the party seeking to establish an estoppel against the government must also meet the high hurdle of proving affirmative misconduct and that such proof requires more than the mere erroneous advice of a government agent. A party seeking to establish an estoppel against the government must therefore prove more than mere negligence, delay, inaction, or failure to follow an internal agency guideline. The doctrine may only be invoked when it does not frustrate the purpose of statutes expressing the will of Congress, or unduly undermine the enforcement of public laws. *Id.*

It is also well established both in OCAHO jurisprudence and in the federal courts that an oral misstatement cannot estop the government. *United States v. Manos & Assocs., Inc.*, 1 OCAHO 130 at 885 (1989), citing *Heckler*, 467 U.S. at 65:

Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority. . . argues strongly for the conclusion that an estoppel cannot be erected on the basis of oral advice. . . .

Waiver, on the other hand, is generally defined as “an intentional relinquishment of a known right.” *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 299 (2d Cir. 1987). The relinquishment of

the right must be made “with full knowledge of the material facts.” *BLACK’S LAW DICTIONARY* 1581 (6th ed. 1990). The party raising the defense of waiver has the burden of proof on each of the elements. *Public Serv. Co. v. Continental Casualty Co.*, 26 F.3d 1508, 1517 (10th Cir. 1994). A waiver may be express or implied, but when it is implied, the conduct, acts, or circumstances relied upon to show it must make out a clear case. *Sweet v. Bank of Okla.*, 954 F.2d 610, 613 (10th Cir. 1992).

2. *The Application of the Standards to Sunshine’s Evidence*

Sunshine seeks to establish a defense of estoppel or waiver based upon a telephone conversation which Danielle Brann allegedly had with agent Wheeler in the Spring of 1995, about two weeks after he picked up the documents requested in the first subpoena. She stated that she asked Wheeler how things were going. According to Ms. Brann, Wheeler’s response was “that there was (sic) a few paper errors, but other than that, everything looked good.” She then conveyed this information to Steve Franklin. Sunshine urges that this alleged conversation ²⁰ led it to believe that it was in compliance and should estop the government from proceeding with this action, or alternatively that the statement constituted a waiver of the government’s right to proceed with this action.

There is some confusion as to whether Sunshine seeks to assert this defense with respect to the paperwork violations, the knowing hire violations, or both. It appears from Respondent’s Supplemental Response to Complainant’s Motion to Strike its Affirmative Defense of Estoppel filed on October 2, 1997, that Sunshine made this assertion only with respect to the paperwork violations. It stated: “[I]f the INS had informed the Respondent of the problems with its I-9 forms, i.e., that its I-9 forms were not being completed properly in April 1995 perhaps the Respondent could have corrected these problems sooner.” Sunshine’s earlier Factual Statement Regarding His (sic) Affirmative Defense of Waiver and Estoppel, however, did not refer to the defense as applying to the paperwork violations, but argued based on the same facts that INS should either be estopped or had “waived its right to pursue a complaint for *unlawful employment* under 8 U.S.C. §1324a regarding those employees who were working for the Respondent at the time of the initial INS review in

²⁰Wheeler had previously denied in an affidavit that the conversation ever took place. He was not asked about it at the hearing by either party.

April of 1995 and for which the respondent produced information to the INS.” (emphasis added).

Whether the defense is raised as to one or both types of violations, it must be rejected. Even had the alleged conversation occurred, it would provide no legal basis for a defense of waiver or estoppel against the government. Assuming *arguendo* that there are circumstances which could give rise to an estoppel against a government agency, such circumstances have not been shown here. Examining Sunshine’s evidence in light of applicable standards, it fails to show such facts as would invoke an estoppel even against a private party. *A fortiori* it has not shown the elements required to create an estoppel against INS. Sunshine’s evidence did not show that Wheeler intended the alleged statement to be “acted upon,” or that Sunshine somehow acted in reliance upon the alleged conversation. Sunshine did not show that it changed its position in any manner in reliance upon the alleged statement, or that it suffered a detriment as a result of any such reliance. Sunshine’s factual proffer did not even address the question of Wheeler’s intent in making the alleged statement. The statement was reasonably accurate as far as it went: out of more than 200 I-9 forms, Sunshine is charged with only 16 actual paperwork errors; the other three violations allege failure to make the forms available for inspection.

As Sunshine by now must recognize however, the fact that the paperwork looked good does not necessarily mean that its hiring practices comply with the law. The suggestion that Wheeler voluntarily waived the government’s right to pursue a complaint for unlawful employment by a vague statement that the paperwork “looked good” is ludicrous. No voluntary or intentional relinquishment of a known right can be implied from such a tenuous basis as the conversation alleged. Neither can the statement reasonably be construed as constituting an approval of Sunshine’s hiring practices.

If Sunshine means to suggest that it cannot be accountable for violations until it has had specific notice or instructions from INS, it is mistaken. The so-called grace period for employers to learn about IRCA and come into compliance with the law expired a decade ago, in 1988. *See generally United States v. Widow Brown’s Inn*, 3 OCAHO 399, at 17–21 (1992) (Congress provided for gradual implementation of the Act by creating a six-month public information period followed by a twelve-month period for warning notices before any enforcement actions took place.).

C. Entrapment

1. Standards for Proving the Defense

The affirmative defense of entrapment has long been recognized in the context of criminal proceedings. Two related elements are required in order to establish it: government inducement of a crime, and a lack of predisposition on the part of the defendant to engage in the criminal act. *Mathews v. United States*, 485 U.S. 58, 63 (1988). It has thus been held that entrapment arises when government conduct induces an undisposed person or otherwise law-abiding citizen to engage in criminal activity. *United States v. Sullivan*, 919 F.2d 1403, 1418 (10th Cir. 1990). The related factor of outrageous government conduct has also been considered under circumstances where the government generates a new crime or induces a person to engage for the first time in criminal activity, *United States v. Mosley*, 965 F.2d 906, 911 (10th Cir. 1992), or where the government simply coerces a person by force, by blackmail or by very large financial inducements to commit a criminal act. *Id.* at 912. Where the government merely interposes itself in ongoing criminal activity it does not manufacture a new crime. In *United States v. Diggs*, 8 F.3d 1520, 1525 (10th Cir. 1993), the court specifically observed, “It is not outrageous for the government to induce a defendant to repeat or continue a crime or even to induce him to expand or extend previous criminal activity” (citing cases). *Accord Mosley*, 965 F.2d at 912.

The use of confidential informants to infiltrate an ongoing criminal enterprise has long been recognized as an accepted tool of law enforcement and a permissible means of investigation. *United States v. Russell*, 411 U.S. 423, 432 (1973), *Jacobson v. United States*, 503 U.S. 540, 548 (1992), citing *Sorrells v. United States*, 287 U.S. 435, 441 (1932). The defense of entrapment was not intended to give the federal judiciary a “chancellor’s foot” veto over law enforcement practices of which it does not approve. *Russell*, 411 U.S. at 435. Rather, it is intended to protect otherwise undisposed individuals from prosecution for government-induced crimes or from coercion.

Although some courts have considered the question of whether a defendant who successfully establishes the defense of entrapment in a criminal case may then assert it in a subsequent *in rem* civil forfeiture action, *see, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), *United States v. \$50,000*, 757 F.2d 103, 105 (6th Cir. 1985), the federal courts have generally limited the defense to

criminal proceedings. *But see Patty v. Board of Med. Exam'rs*, 508 P.2d 1121, 1125 (Cal. 1973) (physician license revocation).

OCAHO jurisprudence has expressly rejected the proposition that a defense of entrapment is available in a 1324a case. *United States v. McDougal*, 4 OCAHO 687, at 874 & n.7 (1994), *United States v. Multimatic Prods., Inc.*, 1 OCAHO 221, at 1485–86 (1990), *United States v. Irvin Indus. Inc.*, 1 OCAHO 139, at 946 (1990).

2. Application of the Standards to Sunshine's Evidence

Sunshine sought leave to amend its answer to assert an affirmative defense of entrapment and/or governmental/prosecutorial misconduct based on the fact that one of Sunshine's employees had acted as a confidential informant for INS and may even have introduced some of the illegal workers. Sunshine cites no authority and I am aware of none applying this defense in administrative civil money penalty proceedings. Sunshine apparently reasons that it should be absolved of responsibility for its hiring practices because of the possible involvement of the confidential informant. Sunshine further contends that any hiring of workers without proper identification was contrary to company policy and instructions and therefore unauthorized. Franklin continues to blame the confidential informant for the fact that Sunshine hired so many unauthorized workers and continues to believe that "we were set up by INS."

I do not reach the question of whether a defense of entrapment would ever be available in a §1324a case because, even if it were, this is not an appropriate case for its application. Sunshine overstates the role of the informant in its activities. No government agent coaxed, threatened, persuaded, or implanted in the mind of an innocent employer the idea of hiring illegal aliens at Sunshine. The use of a confidential informant to obtain information about Sunshine's hiring practices did not begin until well after Sunshine had already hired a number of illegal aliens. Neither did the investigation commence based entirely upon information received from one particular informant. There were three different complaints made to INS about Sunshine's hiring practices in the spring of 1995. The INS Report of Investigation dated September 28, 1995 describes the predication of INS' investigation as follows:

This investigation by USINS was predicated as a result of the service receiving three (3) G123 reports claiming SUBJECT business was hiring and had hired

illegal aliens. These charges were substantiated by a Confidential Informant who was working for SUBJECT business.

The other two reports referred to appear in the record; they involve employees of Sunshine who worked at facilities other than the schools and were clearly made by persons other than the confidential informant.

A defendant seeking to assert the defense of entrapment in a criminal case has the initial burden of showing a lack of predisposition to commit the crime. *United States v. Cecil*, 96 F.3d 1344, 1348 (10th Cir. 1996). That initial burden was not met by Sunshine in this case. Despite Sunshine's efforts to assign the blame for its hiring practices to its lowest level supervisors, it is clear that responsibility for verification of documents and for the signing of I-9s for employees for the Cherry Creek school contract was not delegated to those low-level supervisors, but was retained by Henry Moret, who signed 17 of the 19 I-9 forms for the employees named in the knowing hire count. Even had the informant acted in a supervisory capacity, the actions sanctioned here result from decisions made by Henry Moret, Danielle Brann, and Estela Gamma, not by the confidential informant. None of those management officials was a confidential informant.

Sunshine's motions to compel disclosure of the identity of the confidential informant, for *in camera* examination of the confidential informant and to amend its answer to assert a defense of entrapment are accordingly denied.

IX. Penalties

Although INS' second amended complaint requested total civil money penalties in the amount of \$61,480,²¹ it now urges in the alternative that the maximum penalties be assessed for each of the violations, for a total of \$69,000. In support of this request INS asserts that all the violations of both the paperwork and the knowing hire provisions demonstrate that Sunshine engaged in an illegal pattern and practice of intentionally giving the appearance of compliance with the verification process while using it and the I-9 form to conceal the hiring of illegal aliens in blatant disregard of the law.

²¹Because allegations pertaining to two of the individuals named in that complaint were dismissed, the total penalty, based on the complaint but deducting for dismissed allegations, would be \$58,660.

Sunshine, on the other hand, proposes that should liability be found, the total penalties should be assessed at \$12,900. Sunshine also asserts that because INS has already taken into consideration all the relevant facts in setting the specific penalties requested in the complaint, I am therefore without authority to assess fines in excess of the amounts requested. The law, however, is otherwise, and the cases cited by respondent do not support the proposition advanced. Administrative law judges in this office have not hesitated to increase recommended penalties under circumstances when they regard a proposed penalty as inadequate. *See, e.g., United States v. Carter*, 7 OCAHO 931 at 47 (1997), *United States v. Anchor Seafood Distribs., Inc.*, 5 OCAHO 758, at 296 (1995), *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 945–46 (1994), *United States v. Land Coast Insulation, Inc.*, 2 OCAHO 379, at 687 (1991). The burden of proof, however, is on the complainant to establish by a preponderance of the evidence the factors it alleges justify an aggravation of the penalty.

A. *The Paperwork Violations*

There are five statutory factors which I am required to consider in determining the reasonableness of a civil money penalty for a paperwork violation. These are the size of the business of the employer, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations. 8 U.S.C. §1324a(e)(5).

While INS has promulgated guidelines for the initial determination of civil money penalties, INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties, Aug. 30, 1991 [hereinafter Guidelines], I am not bound by those guidelines. I afford some consideration both to the guidelines and to the reasoning of the parties in determining whether the specific penalties sought have been justified, but note that the range of penalties is set by statute. Those penalties are between \$100 and \$1000 for a paperwork violation, 8 U.S.C. §1324a(e)(5), and between \$250 and \$2,000 for a knowing hire violation, 8 U.S.C. §1324a(e)(4). My obligation is to consider the statutory factors and to ensure that penalties are assessed within the appropriate statutory ranges in light of those factors. This obligation is not constrained by the amount which INS requested in the complaint.

INS argues that all the paperwork violations are equally severe and should be assessed the maximum penalties because Sunshine engaged in an illegal pattern and practice and violated the verification process with the purpose of giving an appearance of compliance to cover up its illegal practice. It asserts that the pattern and practice is demonstrated by the completion of I-9 Forms with 1) disregard to authenticity of documents when any were presented; 2) copies of documents; 3) counterfeit documents; and 4) numbers made up to satisfy the requirements of the Act. I note however that the term “pattern or practice” as used in §1324a is the statutory standard for the initiation of criminal or enjoinder actions in the federal district courts. 8 U.S.C. §1324a(f)(1)–(2). Although applicable regulations dealing with penalties for violations of §1324a discuss “pattern or practice” in the context of both criminal penalties and enjoinder actions, 8 C.F.R. §274a.10(a) and (c), the term “pattern or practice” is notably absent in the sub-section concerning civil money penalties. 8 C.F.R. §274a.10(b). I reject the blanket approach proposed for two reasons, first because I believe that the statute requires consideration of each of the paperwork violations individually in light of the factors set out in the statute, and second because although INS had the option of charging Sunshine with paperwork violations based on the demonstrably false I-9s completed for the individuals who were knowingly hired, it chose for whatever reason not to do so. The falsification of an I-9 is patently an extremely serious, bad faith violation. That some of Sunshine’s managers engaged in falsifying other I-9s however, does not provide a reason to omit consideration of the statutory factors as to *these* I-9s, or to assume that every I-9 at issue in the paperwork counts was *per se* fraudulent.

1. *The Size of Business*

Neither the statute nor the regulations provide guidance for determining the size of a business. *United States v. Tom & Yu, Inc.*, 3 OCAHO 445, at 524 (1992). INS Guidelines characterize the test as whether or not the employer used all the personnel and financial resources at the business’ disposal to comply with the law,²² whether a higher penalty would enhance the probability of compliance, and whether an employer with numerous viola-

²²This test is not well supported by OCAHO case law, except perhaps for *United States v. Continental Sports Corp.*, 5 OCAHO 799, at 633 (1995) (employer was “a large business capable of hiring staff to educate personnel and comply with I-9 requirements”) and is a test arguably more appropriate for good faith than for the size of the business.

tions has a sufficiently frequent turnover rate to interfere with the completion of all the I-9s. Guidelines at 8. INS does not request any aggravation of the penalties based on the size of the employer, but urges that mitigation is not warranted for the size of the business. Sunshine describes itself as medium in size and asserts that the proposed penalties should be mitigated for this reason. It stresses the factor of profit and loss as being more indicative of its actual size than is its gross income, noting that for several years its net profit was only two percent of its gross sales. The company's gross sales for fiscal 1993 were \$1,950,000 (CX8) (Tr.75-76), for 1994 \$2,843,423 (CX9) (Tr.76), for 1995 \$4,049,212 (CX10) (Tr.76), and for 1996 \$4,037,943 (CX11) (Tr.79). Gross profits were \$382,868, \$482,352, \$642,206, and \$686,777 for those years respectively (CX8-11). Final figures for fiscal 1997 were not available at the time of the hearing, but Franklin testified that the company was doing badly and he expected to lose money (Tr.748, RXII).

It is clear that Sunshine is considerably more than a "mom and pop" operation, but considerably less than a multinational. Its turnover rate is certainly very high, but that appears to be standard for the industry and I find no reason to believe that the turnover rate was a factor affecting the completion of the I-9 forms. Sunshine has taken steps to come into compliance and it does not appear that the penalty needs to be enhanced to ensure future compliance. Overall I find that Sunshine is neither a large nor a small business and neither aggravation nor mitigation is warranted based on this factor.

2. The Good Faith of the Employer

The test set out in the Guidelines for good faith is whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it. OCAHO cases have applied a similar test, asking whether the employer exercised "reasonable care and diligence" in ascertaining and following the law. *E.g., United States v. Riverboat Delta King, Inc.*, 5 OCAHO 738, at 130 (1995).

Case law makes clear that the "mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." *United States v. Minaco Fashions, Inc.*, 3 OCAHO 587, at 1907

(1993). Thus a finding of bad faith must be based upon behavior beyond mere failure of compliance. *United States v. Karnival Fashion, Inc.*, 5 OCAHO 783, at 478–80 (Modification by the Chief Administrative Hearing Officer) (1995) (a high number of deficient I–9s is not sufficient alone to demonstrate a lack of good faith). There can be no presumption of bad faith absent an evidentiary showing. While there is no definitive test for a lack of good faith, OCAHO jurisprudence has held some specific actions to be demonstrative of bad faith, such as failing to verify properly after receiving training. *E.g.*, *United States v. Task Force Security, Inc.*, 4 OCAHO 625, at 339 (1994), *United States v. Minaco Fashions*, 3 OCAHO 587, at 1908, *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 573, at 1738 (1993).

INS asserts that the record shows respondent's culpable behavior in its overall illegal hiring practices, and requests that the penalties be aggravated for all the violations due to the lack of good faith. Sunshine, on the other hand, asserts that INS found paperwork violations for only 18 of approximately 350 employees (assuming no liability for Tina Garcia), a mere five percent of the workforce. It contrasts itself with the respondent in *Task Force Security*, in which the employer had 151 paperwork violations after receiving specific training from INS. Sunshine not only received no training, it says it was led to believe that it was in compliance with the regulations, referring to the alleged conversation between Wheeler and Brann. Additionally, Sunshine asserts it has made numerous changes to hiring procedures to ensure that no further violations occur, and it promptly admitted liability to the paperwork counts.

Sunshine's emphasis on its actions after being notified of the violations does not address the question of whether the violations themselves were committed in good faith. *See United States v. Mathis*, 4 OCAHO 717, at 1107–08 (Modification by the Chief Administrative Hearing Officer) (1995), *United States v. Park Sunset Hotel*, 3 OCAHO 525, at 1268 (Modification by the Chief Administrative Hearing Officer) (1993). Good faith refers to the employer's attempts at compliance as of the date of the inspection. *Riverboat Delta King*, 5 OCAHO 738, at 130. The changes made in Sunshine's hiring procedures since 1995 have already been considered in conjunction with the size of the employer and the question of whether a larger penalty is necessary to ensure future compliance; I do not propose to give post-violation conduct additional or retroac-

tive weight in assessing whether or not a specific violation was committed in good faith.

I reject INS' suggestion that all the violations should be found in bad faith because of Sunshine's hiring practices. At the same time, I cannot ignore the fact that two of the managers already found to have acted in bad faith and falsely attested to the examination of documents are the same managers who signed many of the I-9s at issue here. The I-9 forms for Maria Eligia Garcia, Charles G. Maestas, Leobardo Duarte, Ovalle Raul Humberto, Maria Garcia Munoz, Mayela Ramirez, and Neove Silva were signed by Henry Moret. The I-9s for Andres Torres, Armando Escobedo, Martina Herrera, Tina Garcia, Pilar Flores, and Renee Chavez were signed by Danielle Brann. Four I-9s were signed by other managers, one by a supervisor and one has no signature at all.

I am unable to find good faith as to any I-9 form the attestation section of which was completed by Henry Moret because I found that his usual and customary practice was not to examine the underlying documents at all. Moret's cavalier approach to the verification process, his perjured signatures and overall behavior amply demonstrate a lack of good faith in discharging his responsibilities for employment verification. For the I-9s signed by Henry Moret, I find that Sunshine did not act in good faith because his general practice was to try to make the paperwork look right regardless of the facts. As to I-9s completed by Danielle Brann the penalties should also be aggravated because she engaged in similar conduct.

As to the remaining six individuals, there is no evidentiary basis for finding that the violations were other than in good faith. One of these I-9s was signed by Area Manager Steve Yandric, who testified in this case. I believed his testimony and credit that if he attested to examining documents he did so. The only flaw in the I-9 he signed was that it was a few days late. Neither do I find in this record any evidence to support the suggestion that I-9 forms signed by any other contract or area managers, or by supervisor Maria Flores were completed other than in good faith. Aggravation of the penalties for these six violations based on lack of good faith is unwarranted.

3. The Seriousness of the Violations

Paperwork violations are always potentially serious. The seriousness of a violation refers to the degree to which the employer has de-

viated from the proper form. *Task Force Security*, 4 OCAHO 624, at 340. A violation is serious if it renders the congressional prohibition of hiring unauthorized aliens ineffective. *Id.*

The specific violations proved by INS included failure to ensure that six individuals, Andres Torres, Armando Escobedo, Martina Herrera, Joel Lambar, Ivone Silva aka Neove Silva, and Mayela Ramirez, completed Section 1 of Form I-9 properly (Count I), failure to complete Section 2 properly for Tomas Valadez (Count II), failure to complete Section 2 of Form I-9 within three days of hire for eight individuals, Teddi Jo Samano Cordova, Herbert Phillips, Leobardo Duarte, Maria Garcia aka Maria Eligia Garcia, Maria Garcia Munoz, Charles G. Maestas, Raul Humberto Ovalle and Victor Hernandez (Count III), failure to make I-9 forms for three individuals, Renee Chavez, Tina Garcia and Pilar Flores, available for inspection in response to subpoenas dated April 3 and July 24, 1995 (Count IV), and failure to ensure that Della Torres properly completed Section 1 and failure itself properly to complete Section 2 within three days of hiring her (Count V).

The specific omissions in Count I include failures to ensure that six employees: 1) signed the attestation; 2) dated the attestation; 3) indicated their immigration status; and/or 4) provided a work eligibility document. INS asserts that all four categories are serious since they all undermine the mandate that employees attest under penalty of perjury that they are authorized to work in the United States. *Task Force Security*, 4 OCAHO 625, at 341. INS states that as to Count II, the failure to complete any portion of Section 2 of the I-9 must be considered serious because it implies an attempt to avoid liability for perjury and evidences a reckless disregard for the system's obvious mandates, citing *United States v. J.J.L.C., Inc.*, 1 OCAHO 154, at 1098, *aff'd by the Chief Administrative Hearing Officer*, 1 OCAHO 184 (1990), *United States v. Acevedo*, 1 OCAHO 95, at 651 (1989), *United States v. Felipe*, 1 OCAHO 93, at 636 (1989). The violation in Count III, the employer's failure to complete Section 2 within three business days of hire, is alleged to be serious because screening employees as soon as possible prevents the hiring of unauthorized aliens. The failures to prepare and/or make available I-9s (Count IV) are alleged to be serious since they undermine the effectiveness of the statute regardless of whether illegal aliens were involved, citing *United States v. Wu*, 3 OCAHO 434 (*Modification by the Chief Administrative Hearing Officer*) (1992).

Sunshine asserts on the other hand that all the violations were the result of carelessness and were not intentional, and urges that the seriousness of the violations must be considered in the factual setting of the case, *United States v. M.T.S. Serv. Corp.*, 3 OCAHO 448, at 540 (1992), which here includes the fact that Sunshine obtained two large contracts requiring numerous hires in just a few weeks. It also notes that the violations involve a minuscule percentage of the work force and that there were only one or two mistakes in what otherwise were properly completed forms, and that any delays were minimal.

Sunshine's reasoning as to how the factual setting of the new contracts should affect the determination of the seriousness of these violations is flawed. First, the factual settings that have been considered in previous OCAHO cases have generally been limited to the facts of the violations themselves. *E.g.*, *United States v. Ulysses, Inc.*, 3 OCAHO 449, at 551 (1992). No nexus was established here between the hiring of the individuals and the school contracts; in fact, many of these paperwork violations appear to have been wholly independent of the school contracts. For example, the I-9s for Andres Torres, Armando Escobedo, Joel Lambar, and Herbert Phillips were dated between August 1994 and February 1995, well after the initial hiring for the high school contract was completed and before the hiring for the elementary school contract began. Many of these employees did not even work at the schools; according to Sunshine's employee lists, Armando Escobedo, Martina Herrera and Tomas Valadez worked at Norgren, Teddi Jo Samano Cordova worked at the Boulder Medical Pavillion, Herbert Phillips worked at the Aurora Municipal Building, Joel Lambar worked at Cooper Investment and Tiffany Plaza, Victor Hernandez worked at the Medical Pavillion, Mayela Ramirez worked at Front Range Community College, Maria Garcia worked at First Bank, Andres Torres worked at Leprino Foods, Tina Garcia worked at Norwest Bank and Renee Chavez worked at United Power (CX22,15). As far as the record discloses, the school contracts had nothing to do with the errors in those I-9s.

The failure of Andres Torres to sign or date his I-9 is serious since it amounts to a lack of attestation. *United States v. Carter*, 7 OCAHO 931, at 44-45 (1997). The lack of a date, moreover, frustrates the congressional intent that Section 1 be completed on the first date of hire. *Id.* at 39-40. The I-9s for Armando Escobedo and Ivone Silva have no indication of their immigration status. While not as serious as a complete failure to complete an I-9, "it is neverthe-

less exceedingly serious in that the omission of the individual's immigration status defeats the whole purpose of the employment eligibility verification process." *United States v. Fortune East Fashion, Inc.*, 7 OCAHO 992, at 5 (1998). Section 1 of Martina Herrera's I-9 was completed almost two months after the date in Section 2. This is also a serious violation due to the importance of the employee's attestation of eligibility on the date of hire. *United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO 945, at 18 (1997). Joel Lambar and Mayela Ramirez both checked that they were aliens lawfully admitted for permanent residence but failed to enter their Alien Numbers as is required on the forms. Their Alien Numbers do not appear elsewhere on the forms because they each used a state identification card and a social security card for employment eligibility verification. Additionally, Lambar did not date the form next to his signature. The failure to provide the Alien Number is serious, although less serious than some other violations such as failure to sign the form. *Felipe*, 1 OCAHO 93, at 636. The penalties should be aggravated for these individuals.

As found in Count II, Sunshine failed to complete Section 2 of Tomas Valadez's I-9 properly in that the only document it refers to is a Colorado ID, a list B document which verifies only the employee's identity. No List C document was offered to prove Valadez' employment eligibility. There is also no signature or date in the employer attestation section, and thus no way to determine whether any document was actually examined, by whom or when. These violations are exceedingly serious.

Failure to complete Section 2 of form I-9 within 3 days of hire for eight individuals as found for Count III is considered serious because any of these employees could be unauthorized for employment during the entire time his or her eligibility is unverified. *United States v. El Paso Hospitality, Inc.*, 5 OCAHO 737, at 123 (1995). The length of time between the hire and the verification may be considered as a factor in determining the relative seriousness of the violation. *Fortune East Fashion, Inc.*, 7 OCAHO 992, at 5-6. The time between the individual employee's hire and the completion of the verification in these violations varies from 4 to 13 days. While these violations are serious, the shortness of the delays renders the violations less serious than they would have been had the delays been longer. The penalties will be enhanced only slightly for these violations.

The failure to make I-9s available for inspection in response to a subpoena as found for Count IV can be a serious violation. *United States v. Skydive Academy*, 6 OCAHO 848, at 9 (1996). In *Skydive Academy*, the I-9s in question were never delivered, but INS apparently accepted the employer's claim, which was set out in an affidavit, that the forms had been made but could not be located. No such affidavit was filed in this case explaining where the forms had been. The forms were eventually delivered to INS, albeit not until June 28, 1996, almost a year after the subpoena. Each of these I-9s, for Tina Garcia, Pilar Flores and Renee Chavez, was completed by Danielle Brann. Although they are dated November 17, 1994, June 17, 1994 and January 23, 1995, it is unclear from the record whether they were actually completed on those dates and misplaced, or whether they were in fact created later. Neither party addressed this question. The length of the delay renders these violations more serious than they otherwise would have been had the delay been shorter.

The failure to ensure proper completion of Section 1 and the failure to complete Section 2 within three days of hiring Della Torres as found in Count V is also a serious violation. The missing element in Part 1 is the attestation itself, since Della Torres did not sign the form. The time lapse between the dates in Sections 1 and 2 is almost two months, from May 22, 1995 until July 12, 1995. These errors are serious and the penalty should be enhanced for Della Torres' I-9 based on this factor.

4. The Employment of Unauthorized Aliens

One of the individuals for whom Sunshine failed to ensure completion of Section I of Form I-9, Martina Herrera, was an alien not authorized for employment in the United States while she was employed by Sunshine. Three of the individuals for whom Sunshine failed to complete the I-9 form with three business days of hire, Leobardo Duarte, Maria Garcia Munoz and Victor Hernandez, were aliens not authorized for employment in the United States during their employment with Sunshine. One of the individuals for whom Sunshine failed to make I-9 forms available for inspection in response to INS' subpoenas, Pilar Flores, was an alien not authorized for employment in the United States. Sunshine concedes that if these individuals are found to be illegal aliens, the penalty should be increased and prior case law has generally aggravated the penalty

under these circumstances. *E.g.*, *United States v. Anchor Seafood Distribs., Inc.*, 5 OCAHO 758, at 294 (1995).

5. *The History of Previous Violations*

There is no evidence of any prior violations, and INS has previously stipulated that it has no record of prior judgments against Sunshine under 8 U.S.C. §1324a. Sunshine therefore requests mitigation of the penalties based on this factor, citing *Task Force Security*, 4 OCAHO 625, at 341, *United States v. Martinez*, 2 OCAHO 360, at 483 (1991), *rev'd*, 959 F.2d 968 (5th Cir. 1992), *United States v. Honeybake Farms, Inc.*, 2 OCAHO 311, at 95 (1991), *United States v. Huang*, 1 OCAHO 300, at 1987 (1991). Mitigation is in order for this factor.

6. *Other Factors*

Ability to pay is urged by Sunshine as another factor for consideration. Sunshine urges that it has suffered financial losses in the 1997 fiscal year and that those losses necessitate a reduction in the amount of fines it should pay. Franklin testified that Sunshine had suffered a loss of over \$55,000 through the first eight months of the year (Tr.747). He attributes this loss to the increased cost of office support to ensure I-9 compliance, loss of contracts, and the time he has had to devote to this case (Tr.747-48). Sunshine's labor costs have gone up as well (Tr.747).

It has been observed that ability to pay is not a statutory factor but a matter of equity in setting penalties, and as such can only be raised by a party with clean hands. *United States v. Carter*, 7 OCAHO 931 at 10 (1997). However, Sunshine is correct that some OCAHO decisions have considered the ability to pay, and at least three cases have used it as a mitigating factor to reduce the penalties. *United States v. Chef Rayko, Inc.*, 5 OCAHO 794, at 596 (*Modified by the Chief Administrative Hearing Officer on other grounds*) (1995), *United States v. Raygoza*, 5 OCAHO 729, at 52 (1995), *Minaco Fashions*, 3 OCAHO 587, at 1909. In *Chef Rayko, Inc.*, the employer was "almost \$150,000 in the hole" and had been funded for several years through personal credit card debt. 5 OCAHO 794, at 594. The justification for the reduction *Raygoza* was based on a combination of the respondent's financial difficulties and the fact that he was no longer operating the business. 5 OCAHO 729, at 52. In *Minaco Fashions*, a penalty of \$50,000 was

found to be disproportionate where the gross revenues for the year were only \$105,000. Still other cases have refused to reduce the penalty due to the lack of adequate evidence in the record demonstrating a claimed inability to pay. *E.g.*, *United States v. Riverboat Delta King, Inc.*, 5 OCAHO 738, at 132 (1995), *M.T.S. Serv. Corp.*, 3 OCAHO 448, at 540.

In the present case, Sunshine has shown a profit in each of the last several years prior to 1997. It is still in business, and there is no record of an unusual debt. More importantly, the cost of a staff with the ability to fill out I-9 forms properly is not a legitimate reason to reduce the penalty for past violations. The fact that labor costs in this entry level service industry might increase if Sunshine has to comply with the law and to make sure it employs authorized workers instead of illegal aliens would be a highly inappropriate reason to mitigate a penalty.

Another factor Sunshine offers for mitigation is that higher penalties are not needed to enhance future compliance because it has already taken steps to ensure compliance. I have already taken into account the question of future compliance in connection with the size of the employer, so additional consideration as a separate factor would be inappropriate.

7. Factors Considered Together

I find therefore that the size of the business should have no impact on the penalties for the paperwork violations. A mitigating factor in all instances is the lack of prior violations. An aggravating factor for all violations is the seriousness of the violations, for six violations the presence of an illegal alien, and for thirteen violations the lack of good faith. I have examined the penalties requested for the paperwork violations in INS' second amended complaint and find that they are generally within permissible parameters with a few exceptions. The penalties requested for the delay in completing the I-9 forms appear excessive in light of the short delays involved. It also appears that INS has considered aggravating factors but not mitigating factors.

INS' proposal did not request either aggravation or mitigation based on the size of the employer or the absence of prior violations. While I concur that neither aggravation nor mitigation is in order based on size, the penalties should be mitigated to some degree

based on the lack of prior violations. Each proposed penalty will accordingly be reduced by a factor of \$50. Aggravation of penalties as to the I-9s involving unauthorized aliens is appropriate, as Sunshine itself agrees. However INS' request also includes aggravated penalties for all the violations based on the factors of both seriousness of the violations and the lack of good faith. While I agree that all the violations are serious, I do not find them all equally serious, nor do I believe it appropriate on this record to characterize all the violations as occurring in bad faith. Accordingly I have reduced the proposed penalties slightly for the short delays in preparing I-9s because these violations are less serious than the others. As to each of the eight individuals named in Count III I have deducted \$25. I have also reduced the penalties proposed for the I-9s of Joel Lambar, Victor Hernandez, Tomas Valadez, Della Torres, Teddi Jo Samano Cordova, and Herbert Phillips by \$150 each because there is no evidence that these violations were in bad faith. The proposed penalties are accordingly revised as follows:

<i>Count</i>	<i>Number of Violations</i>	<i>Requested Per Violation</i>	<i>Assessed</i>
I	6	\$640 for 5, \$820 for 1	\$590 for 4; \$770 for 1; \$440 for 1
I	1	\$640	\$440
III	8	\$640 for 5, \$820 for 3	\$745 for 2; \$565 for 3; \$415 for 2; \$595 for 1
IV	4	\$640 for 2, \$820 for 2	\$590 for 2; \$770 for 1
V	1	\$640	\$590
			Total: \$11,160

B. The "Knowing Hire" Violations

In contrast to the penalty for a paperwork violation, the statute does not require that in assessing a penalty for a knowing hire violation I consider those same factors, except for the factor of whether there is a history of previous violations. 8 U.S.C. §1324a(e)(4). Penalties for knowing hire violations are within the discretion of the

administrative law judge. *United States v. Day*, 3 OCAHO 575, at 1753 (1993).

INS urges that the penalties should be high for all the knowing hire violations due to the overall circumstances in the case and to deter future violations, noting that Sunshine continued to hire unauthorized workers even after INS raided the schools and notified Sunshine about the large number of unauthorized aliens,²³ and because Moret participated in the falsification of records and thereby assisted unauthorized individuals in evading detection.

Sunshine requests that the paperwork factors be applied as well to the knowing hire violations, and requests that the following additional factors be considered: the knowing hires were a small percentage of the respondent's workforce and took place only at the four Cherry Creek school and one other location; most of unauthorized aliens were hired by Henry Moret or supervisors under him; Moret was fired at the request of INS and the two most offending supervisors no longer work for the company; Franklin did not believe that Moret knowingly hired illegal aliens; and Moret acted in violation of company policy.

It has been observed that the statutory factors may be "of assistance" in setting penalties for a knowing hire violation, *United States v. Ulysses, Inc.*, 3 OCAHO 449, at 550 (1992), but it has also been noted that good faith in complying with the paperwork requirements is irrelevant to the consideration of penalties for knowing hire violations. *United States v. Silver Cloud Invs., Inc.*, 3 OCAHO 509, at 1070 (1993), *United States v. Busy Corner Sportswear*, 3 OCAHO 511, at 1088 (1993). I find it doubtful that a knowing hire of an unauthorized alien could ever be done in good faith, *see United States v. Chacon*, 3 OCAHO 578, at 1775 (1993), or would ever be found to be other than exceedingly serious. *United States v. Alaniz*, 1 OCAHO 297, at 1969 (1991). Rather, the knowing hiring of an unauthorized alien is not in good faith and is patently serious. *Hudson Delivery Serv.*, 7 OCAHO 945, at 19. Knowing hires necessarily involve illegal aliens and culpable employers. The knowing hires in this case were particularly egregious because they involved the deliberate falsification of I-9 forms.

²³I found only one unauthorized employee, Carlos Jesus Bernal, who was knowingly hired after the events of July 20, 1995.

Franklin's belief that Moret did not knowingly hire illegal aliens is simply a disagreement with my factual findings, and in my view contrary to the evidence. He is, of course, entitled to his opinion, but it is not relevant to the penalty determination. The claim that the knowing hires took place only at the Cherry Creek schools and one other facility, moreover, misunderstands Wheeler's testimony. Wheeler testified that the illegal aliens were *mainly* at five different locations. He did not say they were exclusively at those locations.

Sunshine urges that because it has totally altered its methods of hiring as a result of INS activities, a large penalty is not necessary to deter future violations. Given the egregious circumstances of the knowing hire violations in this case, however, reducing the penalties would depreciate the seriousness of the knowing hire violations. I therefore assess the maximum penalty of \$2,000 for each of the four²⁴ employees about whose status Sunshine's managers were shown to have actual knowledge, and \$1,500 for each of the 17 employees about whose status they had constructive knowledge, for a total of \$33,500 for the knowing hire violations.

X. Findings of Fact, Conclusions of Law, and Order

I have considered the pleadings, the documentary and testimonial evidence, the stipulations and admissions of the parties, and the partial summary decision previously entered. All motions and other requests not previously disposed of are denied. On the basis of the record and for the reasons stated, I make the following findings of fact, conclusions of law and final order:

A. Findings of Fact

1. Sunshine Building Maintenance, Inc. is a Colorado corporation having its principal place of business at 7717 W. 6th Avenue, Unit C, Lakewood, Colorado 80215.
2. A Notice of Intent to Fine was served upon Sunshine Building Maintenance, Inc. on or about January 5, 1996.
3. Sunshine Building Maintenance, Inc. made a request for hearing on or about February 1, 1996.

²⁴INS did not charge Sunshine with the knowing hire of Soledad Peña.

4. By an order of partial summary decision previously entered I found that Sunshine Building Maintenance, Inc. engaged in 19 separate violations of the Immigration and Nationality Act as amended, 8 U.S.C. §1324a(a)(1)(B) in that:
- a) Respondent hired the following six individuals for employment in the United States after November 6, 1986, and failed to ensure that they completed Section 1 of Form I-9 (Employment Eligibility Verification Form) properly: Andres Torres, Armando Escobedo, Martina Herrera, Joel Lambar, Ivone Silva aka Neove Silva, and Mayela Ramirez.
 - b) Respondent hired Tomas Valadez for employment in the United States on or about June 19, 1995 failed to complete Form I-9 for him properly.
 - c) Respondent hired the following eight individuals for employment in the United States after November 6, 1986 for whom it failed to complete Form I-9 within three days of their hire: Teddi Jo Samano Cordova, Herbert Phillips, Leobardo Duarte, Maria Garcia aka Maria Eligia Garcia, Maria Garcia Munoz, Charles G. Maestas, Raul Humberto Ovalle, and Victor Hernandez.
 - d) Respondent hired the following three individuals for employment in the United States after November 6, 1986 for whom it failed to make an I-9 Form available for inspection in response to subpoenas dated April 3 and July 24, 1995 but did produce copies on June 28, 1996: Renee Chavez, Tina Garcia, and Pilar Flores.
 - e) Respondent hired Della Torres for employment in the United States on or about May 7, 1995 and failed to complete Section 2 of Form I-9 within three business days of hire, and also failed to ensure that she completed Section 1 of the Form I-9 properly.
4. Martina Herrera, Leobardo Duarte, Maria Garcia Munoz, Victor Hernandez, and Pilar Flores were aliens not authorized for employment in the United States.

5. The parties stipulated that Sunshine Building Maintenance, Inc. hired or continued to employ the following individuals for employment in the United States after November 6, 1986:

1. Daroly Arenas Silva aka Daroly Arenas
2. Lucia Estrella Velasquez
3. Guadalupe Rodriguez Diaz
4. Pedro Antonio Herrera Olaque aka Pedro O. Herrera
5. Claudia Mendez Beltran aka Claudia Mendez
6. Rafael Perez Gonzalez
7. Alfredo Ramirez Madrigal
8. Maria Esperanza Ramirez Madrigal aka Esperanza Ramirez
9. Angeles Solis Cortez
10. Arturo Villegas Castaneda aka Arturo Villegas
11. Juan Picazo Herrera aka Cesar Hernandez
12. Victor Hernandez Picazo
13. Carlos Arenas Avila
14. Hugo Arturo Villegas Corral
15. Omar Rodriguez Velasquez
16. Tomas Hernandez Picazo
17. Isabel Arenas Salazar
18. Octavio Murillo Hernandez
19. Rosalia Jimenez Diaz
20. Doris de Erazo
21. Eumelia Ramirez Madrigal
22. Natalia Montiel de Alvarado
23. Ernesto Garcia Carbajal
24. Carlos Jesus Bernal Alvarado

6. The parties stipulated that the following individuals were aliens not authorized for employment in the United States at any time during their employment at Sunshine Building Maintenance, Inc.:

1. Daroly Arenas Silva aka Daroly Arenas
2. Lucia Estrella Velasquez
3. Guadalupe Rodriguez Diaz
4. Pedro Antonio Herrera Olaque aka Pedro O. Herrera
5. Claudia Mendez Beltran aka Claudia Mendez
6. Rafael Perez Gonzalez
7. Alfredo Ramirez Madrigal
8. Maria Esperanza Ramirez Madrigal aka Esperanza Ramirez
9. Angeles Solis Cortez
10. Arturo Villegas Castaneda aka Arturo Villegas

11. Juan Picazo Herrera aka Cesar Hernandez
 12. Victor Hernandez Picazo
 13. Carlos Arenas Avila
 14. Hugo Arturo Villegas Corral
 15. Omar Rodriguez Velasquez
 16. Tomas Hernandez Picazo
 17. Isabel Arenas Salazar
 18. Octavio Murillo Hernandez
 19. Rosalia Jimenez Diaz
 20. Doris de Erazo
 21. Eumelia Ramirez Madrigal
 22. Natalia Montiel de Alvarado
 23. Ernesto Garcia Carbajal
 24. Carlos Jesus Bernal Alvarado
7. Sunshine Building Maintenance, Inc. hired Mario Garcia Chavez for employment after November 6, 1986.
8. Mario Garcia Chavez was an alien not authorized for employment in the United States at any time during his employment with Sunshine.
9. Sunshine Building Maintenance, Inc. hired the following individuals after November 6, 1986 with actual knowledge that they were aliens not authorized for employment in the United States or continued to employ them after becoming aware of their status:
1. Juan Picazo Herrera aka Cesar Hernandez
 2. Tomas Hernandez Picazo
 3. Eumelia Ramirez Madrigal
 4. Carlos Jesus Bernal Alvarado
10. Sunshine Building Maintenance, Inc. hired the following individuals after November 6, 1986 with constructive if not actual knowledge that they were aliens not authorized for employment in the United States or continued to employ them after becoming aware of their status:
1. Daroly Arenas Silva aka Daroly Arenas
 2. Lucia Estrella Velasquez
 3. Guadalupe Rodriguez Diaz
 4. Pedro Antonio Herrera Olaque aka Pedro O. Herrera

5. Claudia Mendez Beltran aka Claudia Mendez
6. Rafael Perez Gonzalez
7. Alfredo Ramirez Madrigal
8. Arturo Villegas Castaneda aka Arturo Villegas
9. Victor Hernandez Picazo
10. Hugo Arturo Villegas Corral
11. Isabel Arenas Salazar
12. Octavio Murillo Hernandez
13. Rosalia Jimenez Diaz
14. Doris de Erazo
15. Natalia Montiel de Alvarado
16. Ernesto Garcia Carbajal
17. Maria Esperanza Ramirez Madrigal aka Esperanza Ramirez

11. Sunshine Building Maintenance, Inc. is neither a large nor small employer.
12. Sunshine Building Maintenance, Inc. has no history of previous violations of the INA.

B. Conclusions of Law

1. All jurisdictional prerequisites to this action have been satisfied.
2. Respondent Sunshine Building Maintenance, Inc. engaged in 19 separate violations of the Immigration and Nationality Act as amended, 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful after November 6, 1986 to hire an individual without complying with the requirements of §§1324a(b)(1), (2), (3), and 8 C.F.R. §§274a.2(b)(1)(i), (b)(1)(ii), and (b)(2)(ii).
3. Respondent Sunshine Building Maintenance, Inc. engaged in 21 separate violations of the Immigration and Nationality Act as amended, 8 U.S.C. §1324a(a)(1)(A) which renders it unlawful after November 6, 1986 to hire an individual for employment while knowing that individual is not authorized for employment in the United States.
5. To the extent that any statement of material fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of material fact, the same is so denominated as if set forth as such.

C. Order

Sunshine Building Maintenance, Inc. shall henceforth cease and desist from further violating the provisions of 8 U.S.C. §1324a(a)(1)(A) by hiring aliens for employment while knowing the aliens to be unauthorized for employment in the United States, or from continuing to employ unauthorized aliens after learning that they are unauthorized, and shall comply with the requirements of 8 U.S.C. §§1324a(a)(1)(A) and 1324a(a)(2).

Sunshine Building Maintenance, Inc. shall pay a total civil money penalty of \$44,600.

SO ORDERED.

Dated and entered this 4th day of May, 1998.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7) and (8), and 28 C.F.R. §68.53.